

INDIANA LAW REVIEW

2007 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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NOW OR NEVER: REFORMING INDIANA’S COURT SYSTEM

JOHN G. BAKER*

INTRODUCTION

The whole is greater than the sum of its parts. Many states have capitalized on the essence of this well-known aphorism by structurally unifying their courts to provide state-funded systems that are more streamlined and efficient. Although both structural unification and state funding are well-studied topics and a proven way to improve a state’s court system, Indiana has not adopted either of these reforms. Instead, Indiana has one of the most complicated trial court systems in the United States, which leads to inefficiencies and inflates the total amount of court expenditures—the majority of which are currently funded on a local level. However, the recent property tax crisis has provided an impetus for change in our State. Taking advantage of the public discord, we can create a more streamlined court system that is funded by the State, reducing the amount of trial court expenditures and providing Indiana residents with the financial relief they demand.

Part I of this Article describes Indiana’s current court system, including its complex structural organization and primarily local method of funding. Part II details the national push toward structural unification and the almost immediate benefits states experience as a result of such reform. Part III analyzes the link between structural unification and state funding and details the extensive benefits other states have experienced after switching from local to state funding. Part IV summarizes previous proposals other groups have made toward structural unification and state funding in Indiana—specifically, the 1966 Judicial Study Commission report; the 1988 Commission on Trial Courts report; legislation proposed in 1975, 1989, and 2002; and the piecemeal reforms various counties have made. Part V details the renewed push for reform in 2007, including the Special Courts Committee findings and the Indiana Commission on Local Government Reform proposals. Finally, Part VI calls for action, advocating for structural unification and state funding of the Indiana court system by detailing the substantial benefits that would result from these reforms.

I. INDIANA’S CURRENT COURT SYSTEM

A. *Structural Organization*

Indiana Governor Mitch Daniels recently opined, that “[w]hen it comes to the

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structure of local government, Indiana skipped the twentieth century.”¹ It is in need of modernization.² “We have too many . . . of everything, and they all cost money.”³ The Indiana court system is no exception:

Indiana’s current judicial system is comprised of three tiers: 1) various trial courts—including small claims, town, city, county, probate, superior, and circuit—all with varying jurisdictions, 2) an intermediate court of appeals and a tax court, and 3) a supreme court. The problems of Indiana’s multi-tiered trial court system include the local financing of courts, which results in inadequate funding for some courts. These courts must then depend upon judicial mandates in order to function. In addition, some courts suffer from overcrowded dockets, while other courts function only part-time due to their lighter caseload. The best-qualified judges do not always remain in office because an uninformed electorate can vote to remove them. Although Indiana is afflicted with a multiplicity of courts at the trial court level, the national trend has been to unify the courts by moving to a single-tier system.⁴

Trial court jurisdiction in Indiana has been described as “confusing and overlapping”⁵ because various trial courts of general jurisdiction have the authority to hear the same types of cases. For example, several trial courts of limited jurisdiction “hear small claims cases involving the same minimum but slightly different maximum amounts of money, and all but probate court[s] hear minor criminal and traffic cases.”⁶

A unified court system breaks away from the antiquated concept of autonomous courts by having more than one judge assigned to each court.⁷ Indiana’s court system is not unified, as recognized by the Judicial Study Commission (“JSC”), headed by the late Dr. Herman B Wells:⁸

1. Mitch Daniels, Governor of Indiana, 2008 State of the State Address 4 (Jan. 15, 2008), <http://www.in.gov/gov/files/2008stateofstate.pdf>.

2. *See id.*

3. *Id.*; *see also* Audio recording: Mitch Daniels, Governor of Indiana, Remarks at Press Conference Releasing the Indiana Commission on Local Government Reform Report (Dec. 11, 2007), <http://indianalocalgovreform.iu.edu/> [hereinafter ICLGR Report Press Conference].

4. John G. Baker, *The History of the Indiana Trial Court System and Attempts at Renovation*, 30 IND. L. REV. 233, 234-35 (1997) (footnotes omitted).

5. HENRY R. GLICK, *COURTS, POLITICS, & JUSTICE* 42 (3d ed. 1993).

6. *Id.* Glick notes that the Indiana probate and tax courts are the only trial courts that have clearly defined, exclusive jurisdiction over their cases. *Id.*

7. JUDICIAL STUDY COMMISSION, *REPORT OF THE JUDICIAL STUDY COMMISSION* 86 (1966) [hereinafter REPORT].

8. Herman B Wells—History of Indiana University, <http://www.indiana.edu/~libweb/info/history/docs/wells.html> (last visited Mar. 20, 2008). Dr. Wells was born on June 7, 1902. *Id.* He served as President of Indiana University from 1938 to 1962 and is credited with transforming the University “from a good state school with a solid Midwestern reputation to an internationally recognized center of research and scholarship.” *Id.* Upon his retirement, Dr. Wells accepted a

The present [Indiana] system creates an entirely new court every time an additional judge is needed. Under the unified court approach only new judges are created. Thus if a county needs three judges, the present system supplies three separate courts; a unified court system would given them one court with three judges. If the population increased and more judicial manpower was needed, rather than creating an entirely new court the General Assembly would merely add another judge to the existing court.⁹

While the JSC noted that specialized courts might be useful in metropolitan areas that are large enough to support them, it emphasized that “[t]he creation of . . . specialized court[s] presupposes a sufficient caseload to make the court economically feasible.”¹⁰

B. Funding

Indiana’s trial court system is predominately funded by county property taxes.¹¹ Additionally, trial courts generate revenue for court services through filing fees, court costs, fines, and user fees assessed to litigants.¹² These revenues are collected by the local clerk and disbursed pursuant to various statutory provisions to the state, county, general local fund, or to a list of specific funds established by the Indiana General Assembly for specific programs and services.¹³ Municipalities fund city and town courts, but, in many instances, the local government does not maintain a distinct city or town court budget. Instead, expenses are paid directly from the local general fund, making it difficult to track court expenditure information.¹⁴ While the State pays the salaries of trial court judges,¹⁵ counties are still responsible for the salaries of court personnel.¹⁶ Counties may receive state funds for approved pauper defense services and for

lifetime appointment as Chancellor of the University—a position created for him by the University’s Board of Trustees—and served in that capacity until his death on March 18, 2000. *Id.*

9. REPORT, *supra* note 7, at 86.

10. *Id.*

11. IND. COMM’N ON LOCAL GOV’T REFORM, STREAMLINING LOCAL GOVERNMENT: WE’VE GOT TO STOP GOVERNING LIKE THIS 23 (2007), available at http://indianalocalgovreform.iu.edu/assets/docs/Report_12-10-07.pdf [hereinafter ICLGR REPORT].

12. SUPREME COURT OF IND., 2006 INDIANA JUDICIAL SERVICE REPORT: HONORED TO SERVE, VOLUME I: EXECUTIVE SUMMARY 176 (2006), available at <http://www.in.gov/judiciary/admin/reports/ijs/2006report.pdf> [hereinafter IJSR REPORT, VOL. I]; see also *id.* at 177-82 (providing a more thorough description of court fees).

13. *Id.* at 176.

14. *Id.*

15. As of June 2007, the State paid the salaries of 309 trial judges, fifty magistrates, twenty-six juvenile magistrates, and four small claims referees. *Id.* at 204.

16. ICLGR REPORT, *supra* note 11, at 23; see IND. CODE § 33-30-7-3 (2004) (providing that the county shall pay the salary of the deputy clerk, county police officer, bailiff, and reporter assigned to the county court as prescribed by law).

GAL/CASA services for abused and neglected children.¹⁷

A financial comparison of Indiana trial court funding shows a remarkable increase in the amount of expenditures from 1997 to 2006. Adjusted for inflation,¹⁸ state and local government expended \$237,855,033 on the trial court system in 1997 and \$345,817,786 in 2006—an increase of \$107,962,753 over ten years.¹⁹ In other words, the total amount of money spent on local courts increased by 45% between 1997 and 2006.²⁰ During that time, the number of cases filed in the Indiana trial courts increased by 23%.²¹ This Article examines these statistics further when it proposes shifting the burden of trial court funding to the State.²²

II. THE NATIONAL PUSH TOWARD STRUCTURAL UNIFICATION

While some Indiana counties have taken the initiative to structurally unify their trial court systems,²³ there has been little progress in the statewide battle toward unification. On the national scene, however, many states have unified aspects²⁴ of their court systems. This push toward unification began after Roscoe

17. ICLGR REPORT, *supra* note 11, at 176.

18. An inflation calculator is available from the United States Department of Labor. Consumer Price Index Homepage, <http://www.bls.gov/CPI> (follow “Inflation Calculator” hyperlink) (last visited June 8, 2008).

19. IJSR REPORT, VOL. I, *supra* note 12, at 183.

20. *Id.* Some of the expenditure increases during this time period can be attributed to the much-needed increase in judicial salaries. In 1999, the Public Officers Compensation Study Committee released a report recommending, in part, that the General Assembly enact a bill increasing the annual salary for trial court judges from \$90,000 to \$97,000. PUB. OFFICERS COMP. STUDY COMM., IND. GEN. ASSEMBLY, FINAL REPORT OF THE PUBLIC OFFICERS COMPENSATION STUDY COMMITTEE 6 (1999), available at <http://www.state.in.us/legislative/interim/committee/1999/committees/reports/POCS2B1.pdf>. In 2005, the General Assembly passed legislation requiring that each full-time judge of a circuit, superior, municipal, county, or probate court receive an annual salary of \$110,500. IND. CODE § 33-38-5-6 (Supp. 2007). This pay increase was necessary to minimize tensions between the legislative and judicial branches, increase compensation to keep up with cost of living increases, and attract scholars to the bench.

21. IJSR REPORT, VOL. I, *supra* note 12, at 81. Specifically, there were 1,125,438 cases filed with trial courts in 1997 and 1,383,547 cases filed in 2006—an increase of 258,109 cases over ten years. *Id.*

22. See *infra* notes 112-16 and accompanying text.

23. See *infra* notes 77-79 and accompanying text.

24. The National Center for State Courts (“NCSC”) provides useful information regarding the topic of trial court unification. Nat’l Ctr. for State Courts, CourTopics Index, <http://www.ncsconline.org/WC/CourTopics/topiclisting.asp> (last visited June 8, 2008). The NCSC believes that total unification consists of five characteristics: centralization of administrative authority, centralization of rulemaking powers, unitary budgeting, state funding of trial courts, and trial court consolidation. Nat’l Ctr. for State Courts, Court Unification FAQs, <http://www.ncsconline.org/wc/CourTopics/FAQs.asp?topic=CtUnif> (last visited July 24, 2008).

Pound's famous address to the American Bar Association,²⁵ which served as "[t]he spark that kindled the white flame of progress."²⁶ Pound opined that the U.S. court system was "archaic in three respects: (1) in its multiplicity of courts, (2) in preserving concurrent jurisdictions, (3) in the waste of judicial power which it involves."²⁷ Ultimately, Pound's speech encouraged "the proliferation of specialized courts," served as an "impetus" for the establishment of the American Judicature Society, began the movement toward "alternative dispute resolution techniques," "fueled the drive for uniform rules of practice and procedure," and "called for structural reforms [culminating] in the establishment of judicial councils, judicial conferences, and administrative offices of courts."²⁸

Court unification generally consists of five basic elements: "(1) consolidation and simplification of court structure, (2) centralized management, (3) centralized rule making, (4) centralized budgeting, and (5) state financing."²⁹ Adopting a unified court system eliminates the multiplicity of courts at the trial level, and, more specifically,

[t]he characteristics of a unified court system are a single structured court divided into two or three levels or branches, one to handle the appellate business and one or two for trial work. The business and personnel affairs of the system are usually managed by a chief justice assisted by an administrative director and staff. The power to make procedural and administrative rules is vested in the supreme court. Tribunals which hear limited jurisdiction cases are a part of the whole working scheme and enjoy a dignified status.³⁰

In a unified system, a new court is *not* created in response to an increased need for judicial resources. "Instead, a new judge is added to the existing court to help relieve an overcrowded docket."³¹ This increases the court's flexibility to adjust to varying demands and shift resources to wherever they are needed most.

There are many benefits of structural unification, including

a reduction of overlapping and fragmented jurisdiction among the trial

[hereinafter NCSC FAQs]. While the NCSC recognizes that no state has a completely unified system pursuant to its criteria, it advises each state to analyze its system and adopt the unification characteristics it deems appropriate. *Id.*

25. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

26. John H. Wigmore, *The Spark that Kindled the White Flame of Progress—Pound's St. Paul Address of 1906*, 46 J. AM. JUDICATURE SOC'Y 50, 50 (1962).

27. Pound, *supra* note 25, at 402.

28. Charles Gardner Geyh, *Roscoe Pound and the Future of the Good Government Movement*, 48 S. TEX. L. REV. 871, 876-77 (2007).

29. James D. Gingerich, *Out of the Morass: The Move to State Funding of the Arkansas Court System*, 17 U. ARK. LITTLE ROCK L. REV. 249, 251 (1995).

30. R. Stanley Lowe, *Unified Courts in America: The Legacy of Roscoe Pound*, 56 JUDICATURE 316, 318 (1973).

31. Baker, *supra* note 4, at 251.

courts, better deployment and use of judges and support staff, elimination of conflicting local court rules and establishment of uniformity of process, more expeditious trial and appellate processes, . . . and better access to records and equipment to facilitate case management and reduce costs.³²

Although various local state courts initially resisted court unification and state funding,³³ the ever-increasing caseloads of the 1980s required additional judges and court staff and “fostered a new motivation [for reform]—fiscal relief for local governments.”³⁴ Thus, “faced with a decreasing revenue base,” local governments “became the primary proponents of state funding” and court reformation.³⁵

Sue Dosal, the State Court Administrator for the Minnesota Judicial Branch, recently proffered Minnesota’s court system as a paradigm for other states considering court unification:³⁶

I think Minnesota is the poster child for [Pound’s] argument for unified courts. We have a single trial court. That’s it. There are no municipal courts; there are no other kinds of courts, only a single trial court, and an intermediate court of appeals and a supreme court.

. . . .

In the 1970s, we had a plethora of different kinds of lower courts. We merged them into a single county court. And then a dozen years later we moved to merge them into the general jurisdiction court. We’ve had a single court since that time.

Minnesota is one of only a handful of states that have a pure single-level trial court. . . .

We in Minnesota believe our experience shows that Pound’s call for unification—at least as applied to the trial courts—has stood the test of

32. *Id.* at 235.

33. Critics of court unification and state funding argue that unification’s reliance on central management principles removes control from local officials, who they believed are better equipped to handle local problems. Gingerich, *supra* note 29, at 251-52.

34. *Id.* at 252.

35. *Id.* (citing ROBERT TOBIN & JOHN HUDZIK, NAT’L CTR. FOR STATE COURTS, THE STATUS AND FUTURE OF STATE FINANCING OF COURTS 6 (1989)). Currently, nine states finance 90-100% of their court systems at the state level—Alaska, Connecticut, Hawaii, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. NCSC FAQs, *supra* note 24.

36. For diagrams illustrating Indiana’s complex court structure and Minnesota’s unified court structure, see Nat’l Ctr. for State Courts, NCSC: Research, Court Statistics Project, http://www.ncsconline.org/D_Research/Ct_Struct/Index.html (last visited Mar. 20, 2008). These diagrams are attached as an Appendix to illustrate the stark contrast between the systems.

time. There have been many benefits from this unification. Clearly there's no confusion over where to file a case. We have increased the flexibility in the allocation of judicial resources and the assignment of judges to cases. Judge time can more easily be allocated where the need is.

In the last ten to fifteen years, our caseload has changed dramatically. We've had an enormous increase, perhaps sixty percent in the last decade, in serious criminal and juvenile cases, while our civil cases have remained flat, and our minor cases have actually declined. Unification has allowed us, in a world of scarce resources, to decide which kind of cases are going to have priority and then to make that happen by how we assign our judges.

We have experienced cost efficiencies in both time and travel reduction. We are a rural state. Seventy-seven counties, roughly speaking, out of our eighty-seven counties are rural. Before unification, judges were literally passing each other on the roads as they went from one court to the other to hear the particular kind of case that they could hear. And, of course, we've also seen a reduction in delay as a result of the judges being able to hear the cases promptly.

As envisioned by Pound, Minnesota has, within the unified court, created what he called "specialist" judges in our larger jurisdictions. Judges rotate through divisions on two- or three-year terms. While they are not permanent, they're there long enough to gain expertise in some of the complicated areas. It also avoids the burnout of judges who are permanently assigned to particular kinds of case types. In recent years, we have seen the rise of problem-solving courts as well, which are actually special calendars with a kind of a specialist judge. All of this is quite easily accomplished within a unified court.³⁷

Perhaps the most compelling argument in favor of unification is that users of unified court systems are statistically more satisfied than users of court systems that are not unified. The NCSC conducted an empirical study in 1996 and found "that the court systems in [the] study that 'consistently received above average satisfaction ratings . . . also have the most unified [trial] court systems.'"³⁸ Thus, the study concluded that "unification remains an essential tool for court

37. Sue K. Dosal et al., "Administration of Justice is Archaic"—*The Rise of Modern Court Administration: Assessing Roscoe Pound's Court Administration Prescriptions*, 82 IND. L.J. 1293, 1297-98 (2007). Iowa, Kentucky, and California have also recently unified their court systems. Randall T. Shepard, *The New Role of State Supreme Courts as Engines of Court Reform*, 81 N.Y.U. L. REV. 1535, 1539 (2006).

38. Dosal et al., *supra* note 37, at 1299 (quoting DAVID B. ROTTMAN & WILLIAM E. HEWITT, TRIAL COURT STRUCTURE AND PERFORMANCE: A CONTEMPORARY REAPPRAISAL 63 (1996)) (alteration in original).

reform.”³⁹

III. THE LINK BETWEEN STRUCTURAL UNIFICATION AND STATE FUNDING

Although structural court reform and state funding are distinct topics, they are often part and parcel in any discussion concerning meaningful change. In fact, state funding is commonly considered to be an element of structural unification because of its emphasis on centralized administration.⁴⁰ While the national trend toward structural unification began early in the twentieth century, by the late 1970s, fiscal relief for local governments had become the dominant factor motivating the state funding of trial court operating costs:

Why did this occur? Obviously, local fiscal problems were one cause, but it is also clear that the nature of court operations changed dramatically in the 1970s. The number of judges jumped, as did the level of judicial compensation. Local governments, even if they were not responsible for judicial salaries, were responsible for providing facilities, staff, and equipment for each new judge, not to mention absorbing additional jury costs.

. . . Constitutional requirements regarding indigent defense, treatment of juveniles, and protection of the mentally incompetent created a set of large and volatile expenditures that could be imposed by judicial mandate. The demands of modernized court administration introduced a cadre of trained managers into the court system and created demands for various new technologies: record automation, recording devices, computer-aided transcription, and word processing equipment. Breakdown in family structure caused large expenditures for social support services, counseling, juvenile detention facilities, foster care, and child support enforcement. A collateral effect of social disintegration was the need for more juvenile and adult probation officers. No longer did a court consist of a judge, a reporter, and some clerks. Courts were becoming complex administrative entities.⁴¹

Proponents of state funding believe that it “allows for a more equitable distribution of resources” among local courts and relieves the pressure for local courts to generate their own revenue.⁴² Additionally, state funding supports elements of structural unification, including centralized management and budgeting, which is why the topics are often discussed concurrently.⁴³ As of 2003, the nation has more state-funded trial court systems than locally-funded

39. *Id.* (quoting ROTTMAN & HEWITT, *supra* note 38, at 5).

40. *See supra* notes 24, 29 and accompanying text.

41. ROBERT W. TOBIN, NAT'L CTR. FOR STATE COURTS, *FUNDING THE STATE COURTS: ISSUES AND APPROACHES* 36-37 (1996), available at http://www.ncsconline.org/WC/Publications/KIS_FundCtFundingtheStCts.pdf.

42. NCSC FAQs, *supra* note 24.

43. *Id.*

ones, with thirty-three states funding a majority of their state's system.⁴⁴

To be fair, not all states that have structurally unified their court systems have also adopted state financing.⁴⁵ However, many states that have switched to state funding report positive results. In Massachusetts, proponents of unification recognize that there were

a number of advantages to the shift to state financing. . . . Steady gains have been made in personnel administration, with standardized procedures and a higher level of accountability Programs to reduce delay and improve facilities could have been accomplished in a county-funded system only piecemeal; state funding allowed more comprehensive efforts.⁴⁶

In Oregon, enthusiasts point to the strengthened role of the Chief Justice of the Oregon Supreme Court, the stability of funding, and the improvement in accountability as positive effects of state funding.⁴⁷

In sum, structural unification and state funding are distinct topics that can be independently adopted. However, a state can also adopt these interrelated reforms simultaneously to resolve organizational problems and increase the state's economic power. With this in mind, I turn to previous proposals for structural unification and state funding in Indiana.

IV. PREVIOUS EFFORTS TOWARD STRUCTURAL UNIFICATION AND STATE FUNDING IN INDIANA

By the last quarter of the twentieth century, Indiana had a multiplicity of courts, including the Indiana Supreme Court; the Indiana Court of Appeals; and circuit, superior, criminal, juvenile, probate, municipal, justice of the peace, city, town, and magistrate courts.⁴⁸ Whenever a need for additional judicial resources arose, the Indiana General Assembly's response was to create an autonomous court to handle the county's demand.⁴⁹

In 1965, the Indiana General Assembly authorized the first truly unified court in Indiana, the St. Joseph Superior Court.⁵⁰ Before unification, St. Joseph County

44. SUSAN M. BYRNES, COURT EXECUTIVE DEV. PROGRAM, STATE FUNDING OF TRAIL COURTS: MINNESOTA'S TRANSITION EXPERIENCE 54 (2004), available at http://www.ncsconline.org/D_ICM/programs/cedp/papers/ResearchPapers2004/Byrnes,Susan.pdf.

45. TOBIN, *supra* note 41, at 38 (citing Illinois, Idaho, Minnesota, and Wisconsin as examples of states that, at that time, had not implemented state funding despite implementing elements of structural unification).

46. JOHN K. HUDZIK, NAT'L CTR. FOR STATE COURTS, THE EFFECTS OF STATE FINANCING: SUMMARY FINDINGS FROM THE FOUR-STATE STUDY 15 (1990), available at http://www.ncsconline.org/WC/Publications/KIS_FundCtEffStFinSumm.pdf.

47. *Id.* at 17.

48. Baker, *supra* note 4, at 250.

49. *Id.*

50. Act of Mar. 11, 1965, ch. 266, 1965 Ind. Acts 727 (codified as amended at IND. CODE §§

had two superior courts; however, in 1965, these courts merged, and an additional judge was added.⁵¹ Thus, after unification, the St. Joseph Superior Court consisted of three judges who worked together and shared the responsibility of managing the cases entrusted to that court.⁵²

In 1966, the JSC released a report recognizing that Indiana's court structure was fragmented, disorganized, and inefficient.⁵³ After describing the differences between autonomous and unified courts, the JSC observed that while on the surface the systems "may seem to be the difference between Tweedledum and Tweedledee[.]" a closer examination revealed startling differences.⁵⁴ After only one year of unification in the St. Joseph Superior Court, the JSC observed:

The results of this experiment have been remarkable. Docket sheets that were backlogged are now completely up to date, and cases set for trial in June of 1966 have already been tried by the end of September, 1966, even though no trials are held during the summer months.

The key to this system has been the opportunity to divide the duties of the court among the three judges. No longer is each judge responsible for the entire business and administration of the court. The administrative duties of the court have been apportioned so that no one judge is over-burdened. Judge Dempsey assumes responsibility for juries, Judge Walton prepares the Court's budget and handles its financial affairs, and Judge Kopec maintains the assignment list. The Court itself has been broken down into three divisions and the judges rotate from one division to another every five weeks. . . .

. . . [T]he bar is extremely pleased with the new Superior Court.⁵⁵

Based on St. Joseph County's positive experience, the JSC proposed a system that would function as "one great court in which there are three divisions: a Supreme Court, a Court of Appeals, and a Circuit Court."⁵⁶ While the JSC maintained that consolidating the courts would be more efficient, "those resisting change in the current system argued that municipal courts, city courts, and county courts were essential cogs in the judicial machinery."⁵⁷

33-33-71-5 to -13 (2004)).

51. Baker, *supra* note 4, at 250.

52. *Id.*

53. REPORT, *supra* note 7, at 86.

54. *Id.*

55. *Id.* at 86-87.

56. *Id.* at 88.

57. Baker, *supra* note 4, at 251. To counter this argument, advocates for unification contend that "creating courts to handle inferior matters is equivalent to creating inferior courts," placing the judges in these courts in an inferior status. *Id.* Allowing these courts to have inferior status reduces public expectation, makes it difficult to recruit good judges, and places these courts outside the interest of the more influential members of the bar. *Id.* at 251-52 (citing Lyle H. Truax, *Courts of*

Despite the national trend toward unification, the Indiana General Assembly was unwilling to make such sweeping changes and, ultimately, thwarted its own attempt to adopt the JSC's proposal.⁵⁸ In 1975, the General Assembly enacted the County Court Law, "which revamped the organization of the Indiana trial courts of limited jurisdiction by replacing them with county courts,"⁵⁹ eliminating justice of the peace courts and providing for the elimination of city and town courts at a later date.⁶⁰ Had this legislation been followed, Indiana would have had a simplified four-tier court system—the Indiana Supreme Court, the Indiana Court of Appeals, trial courts of general jurisdiction, and trial courts of limited jurisdiction. However, before the date on which the city and town courts were to be eliminated, the Indiana General Assembly enacted a statute granting cities and towns the authority to independently decide whether to create or abolish their courts, eradicating the previously enacted legislation.⁶¹

Reform attempts resumed in 1986 when the Indiana Judges Association persuaded the Indiana General Assembly to create a commission to address the lack of uniformity in the Indiana court system.⁶² The Commission on Trial Courts ("CTC") consisted of the Chief Justice of the Indiana Supreme Court, eight legislators, a trial judge, a member of the county council, a member of the county commissioners, and a county clerk.⁶³

After conducting field hearings, meetings, and opinion surveys, the CTC released a final report in 1988.⁶⁴ The CTC found that the trial court system had evolved into a series of circuit and superior courts, with each county funding the majority of trial court operating expenses.⁶⁵ While counties historically provided 78% of trial court funding, recent increases had significantly enlarged their financial burden—counties expended \$12 million more in 1987 than they had in 1982, an *annual increase* of nearly 6%.⁶⁶

Although most county councils were charged with authorizing a trial court budget, the CTC found that county council members were often unfamiliar with problems and issues affecting court operation, which resulted in a disconnect that

Limited Jurisdiction are Passé, 53 JUDICATURE 326, 327-28 (1970)).

58. *Id.* at 252.

59. *Id.*

60. 1975 Ind. Acts 1667, 1683-1701 (codified as amended at IND. CODE §§ 33-30-1-2 to -7-4 (2004 & Supp. 2007)).

61. Baker, *supra* note 4, at 252 (citing IND. CODE § 33-10.1-1-3 (1993)).

62. IND. CODE §§ 33-1-15-1 to -8 (1986). Although the legislation expired in 2003, it was recodified as IND. CODE §§ 33-23-10-1 to -8 (2004 & Supp. 2007).

63. IND. JUDGES ASS'N, A PROPOSAL FOR REFORM OF THE INDIANA TRIAL COURT SYSTEM, at iii (1986).

64. COMM'N ON TRIAL COURTS, IND. GEN. ASSEMBLY, FINAL REPORT OF THE COMMISSION ON TRIAL COURTS 1 (1988).

65. *Id.*

66. Specifically, counties expended \$43,000,000 on the trial court system in 1982 and \$55,000,000 in 1987. *Id.* These statistics are taken directly from the CTC report, and it is unclear whether the CTC adjusted the numbers for inflation.

led to conflict between trial court judges and county council members.⁶⁷ Additionally, the CTC found that Indiana's trial court system results in disparate funding between counties because "not all counties have stable economies" supporting their systems.⁶⁸

Based on these findings, the CTC recommended that Indiana trial courts merge into a single court to "be administered at the state level by the Indiana Supreme Court."⁶⁹ The Indiana Supreme Court would have the authority to "adopt rules concerning [t]he employment and management of court personnel," the "administration of the court system," and the "requirements for submission and approval . . . of an annual budget prepared by the circuit courts."⁷⁰ Pursuant to the CTC's recommendations, trial court judges would "be assigned to specific dockets—such as small claims, minor offenses and violations, criminal, juvenile, civil and probate matters—based on local rule-making authority."⁷¹ Additionally, the CTC recommended that the State be the sole funding source for the trial court system because "trial courts enforce and uphold *state* legislative policy."⁷² To help fund the system, revenues collected from court fees would be deposited into a general state fund.⁷³

As a result of the CTC's recommendations, Senate Bill 12 was introduced to the General Assembly in 1989.⁷⁴ However, the proposed legislation ultimately failed, primarily because it sought to transfer court funding from the counties to the State.⁷⁵ Former Governor Frank O'Bannon introduced similar legislation in 2002 as part of a proposed tax relief plan, but the proposed legislation did not make it out of the House Ways and Means Committee.⁷⁶

While no further attempts have been made to unify the structure or funding of the courts on a statewide basis, some counties have structurally unified their trial courts on a piecemeal basis. For example, Monroe County merged the Monroe Superior Court with the Monroe Circuit Court to create the Monroe Unified Circuit Court in 1993.⁷⁷ Additionally, the Marion County Municipal

67. *Id.* at 17.

68. *Id.*

69. *Id.* at 2, 17.

70. *Id.* at 17.

71. *Id.* at 20.

72. *Id.* at 16 (emphasis added).

73. *Id.*

74. *See Baker, supra* note 4, at 254.

75. *Id.*

76. Peggy Quint Lohorn, Chair of the Special Courts Comm., Presentation: Indiana's Court Structure (Mar. 2007).

77. IND. CODE §§ 33-4-10-1 to -8 (1993) (current version at IND. CODE 33-33-53-2 to -8 (2004 & Supp. 2007)). As a member of the Monroe Superior Court at the relevant time, I believe that the county's courts were actually unified *de facto* on January 1, 1981, when James M. Dixon, who had served as judge for Monroe Court Division I, was elected to the Monroe Circuit Court. The courts merged their budgets, personnel, and probation departments at that time.

Courts were merged into the Marion Superior Courts in 1995.⁷⁸ More recently, Delaware County unified its courts into one court of general jurisdiction, the Delaware Circuit Court.⁷⁹ While these counties' courts have a unified structure, they are still largely funded by the counties over which they preside.

V. RENEWED PUSH FOR REFORM

In 2007, at the request of Indiana Supreme Court Chief Justice Randall T. Shepard, the Special Courts Committee ("SCC") reviewed the structure of Indiana's court system.⁸⁰ The SCC, chaired by Montgomery County Superior Court #2 Judge Peggy L. Quint Lohorn, observed that because Indiana does not have an overall goal for a structured trial court system,

the Commission on Courts and the General Assembly continue to address individual local requests for amendments to the trial court structure on an ad hoc basis in order to meet the growing local needs. As a result, the state's current trial court structure is among the most complex in the United States, varies among the counties, and hinders judicial attempts for efficient administration and case processing.⁸¹

The SCC identified six benefits that would result from unifying Indiana's courts, including (1) an easier system for residents to use and understand, (2) improved public perception of the system, (3) a more efficient and economic use of judicial resources, (4) increased local cooperation, (5) combined resources to achieve economies of scale, and (6) the elimination of jurisdictional gaps.⁸² Ultimately, the SCC concluded that "any proposal should continue to give local courts autonomy in designing the local organization to meet local needs (i.e. case allocation), and oversight of administrative issues, such as court employee matters."⁸³

The 2007 property tax crisis also renewed calls for reform.⁸⁴ In July 2007,

78. IND. CODE § 33-6-1-1 (repealed 1995). The Marion County courts are now governed by IND. CODE §§ 33-33-49-1 to -34 (2004 & Supp. 2007).

79. IND. CODE § 33-33-18-2 (2004).

80. Lohorn, *supra* note 76.

81. *Id.*

82. *Id.*

83. *Id.*

84. The Legislative Services Agency estimates that net property taxes in Indiana rose by approximately \$800 million between 2006 and 2007—an increase of more than 14% and approximately six times the current inflation rate of 2.36%. Brian Howey, *Solutions are Pending on the Property Tax Crisis*, MUNCIE FREE PRESS, Oct. 4, 2007, available at <http://www.munciefreepress.com/node/17438>. As a result of this steep increase, lawmakers have provided \$550 million in relief through rebates and homestead credits for homeowners over the next two years. Associated Press, *Property Tax Hikes Hot Topic Nationally*, J. & COURIER (Lafayette, Ind.), Dec. 26, 2007, at A1. Additionally, on October 23, 2007, Governor Daniels "proposed a sweeping plan that would cap tax bills for homeowners, landlords and businesses." *Id.* The proposed plan "would

Chief Justice Shepard and former Governor Joe Kernan were appointed to chair the bipartisan Indiana Commission on Local Government Reform ("ICLGR").⁸⁵ The ICLGR was charged with recommending ways to restructure local government to increase efficiency and reduce the financial burden on Indiana taxpayers.⁸⁶ Specifically, the ICLGR was entrusted with "reviewing previous studies and analyses of local government reform and restructuring in Indiana," "gathering additional information it deems necessary," and "develop[ing] recommendations that, if adopted, would make a real difference in the operation and cost of local government."⁸⁷

On December 11, 2007, the ICLGR released a report containing twenty-seven recommendations for streamlining Indiana's local government.⁸⁸ The proposed changes recommend, in part, abolishing township government,⁸⁹ eliminating county commissions,⁹⁰ electing a single county executive,⁹¹ and consolidating more than half of Indiana's school districts.⁹² "If enacted, the recommendations would reduce the number of local government units from 3086 to 1931" and lower the number of elected officials by more than half, from 11,012 to 5171.⁹³

While the ICLGR did not specifically recommend structurally unifying Indiana's court system, Recommendation #7 proposes shifting trial court funding from local government to the State:⁹⁴

By state law, Indiana trial courts have responsibility for criminal, civil and juvenile cases and for providing probation officers and public defenders. But most funding for these courts and court personnel is provided by county [property] taxes. This system of county funding for personnel and programs, required by state law, has created inherent tensions between county governments and the judiciary. In addition, inequities exist among counties' caseloads, personnel and probation and public defender programs. This means that some Hoosiers are denied

be funded in part by raising the state sales tax" to seven percent. A summary of the Governor's proposed property tax relief plan is available at http://www.in.gov/gov/files/Tax_Plan_Summary.pdf (last visited Jan. 16, 2008).

85. Indiana Commission on Government Reform, <http://indianalocalgovreform.iu.edu/> (last visited June 9, 2008).

86. MITCHELL E. DANIELS, JR., IND. OFFICE OF THE GOVERNOR, BLUE-RIBBON COMMISSION ON LOCAL GOVERNMENT REFORM: GOVERNOR'S CHARGE TO THE COMMISSION, http://indianalocalgovreform.iu.edu/assets/docs/Charge_Complete_Text_final_7-25-07.doc.

87. *Id.*

88. *See generally* ICLGR REPORT, *supra* note 11.

89. *Id.* at 17.

90. *Id.* at 16.

91. *Id.*

92. *Id.* at 27.

93. Mary Beth Schneider, *Reform Proposal Slices Indiana Government*, INDIANAPOLIS STAR, Dec. 11, 2007 (on file with author).

94. ICLGR REPORT, *supra* note 11, at 23.

prompt access to courts and court services simply because they live in a county unable to support its local courts at the same level as others.

While trial court judges would continue to be responsible for local court personnel and administration, state funding would improve the judiciary's ability to allocate resources where they are needed most. This would help assure equal access to courts, probation, services and public defenders. In addition, state funding would reduce costs by allowing purchasing to be done on a larger scale.

We recommend that the state assume funding for the state's trial court system, including probation officers and public defenders, so that the Indiana courts can meet the needs of the people they serve; conflicts with county government be eliminated; equal access can be assured; and economies of scale can be achieved.

Because state money, court costs and user fees already finance so much of court expenses, and because implementation should be a multi-year project, the fiscal impact should be manageable.⁹⁵

VI. NOW OR NEVER

At the press conference releasing the ICLGR report, Governor Daniels opined that the structure of Indiana government "is in need of modernization."⁹⁶ When pressed about the likelihood that the ICLGR's proposals would be adopted, Governor Daniels and former Governor Kernan both responded, "If not now, when?"⁹⁷ The tremendous public outcry about the 2007 property tax crisis makes the upcoming legislative sessions ripe for action.⁹⁸ Scholars have previously predicted that it would take the efforts of organizations beyond the legal community to bring about reform in our court system,⁹⁹ and these recent events could be the impetus needed to bring about substantive change in our State's system.

The SCC's findings and the ICLGR report propose structural court unification and a shift to state funding. These proposals are based on substantive data and principles that have been advanced, but not implemented, in Indiana for

95. *Id.* Additionally, Recommendation #3 advocates that the county clerk's duties be transferred to the courts. *Id.* at 17.

96. ICLGR Report Press Conference, *supra* note 3.

97. *Id.*

98. Numerous protests were held in response to the increased property taxes and some residents "dunked their [property tax] bills in rivers and lakes to mimic the Boston Tea Party." Mike Smith, *Property Taxes to Dominate 2008 Session in Indiana*, ASSOCIATED PRESS, Jan. 2, 2008, available at http://biz.yahoo.com/ap/080102/in_xgr_legislative_preview.html?v=1&printer=1.

99. See, e.g., Robert A. Leflar, *The Quality of Judges*, 35 IND. L.J. 289, 292-93 (1960).

decades.¹⁰⁰ Specifically, court unification and the shift to state funding would lead to a more efficient judicial system that provides taxpayers with the financial relief they demand. However, proponents of reform will likely meet resistance, and as others have suggested,¹⁰¹ a legislative study committee may be the best method to study the specifics of implementation.

While it will take years to implement these monumental reforms and transition local government, the positive effects of these changes will be worth the growing pains. We must act now to improve our court system's efficiency, reduce spending, and modernize Indiana. Therefore, I ask Indiana citizens and public officials to support structural unification and state funding, and I submit the following general framework for implementation—which presents only some of the countless benefits this reform will bring—for your consideration.¹⁰²

A. Structural Unification

Shifting to a unified system would have the greatest impact on Indiana's trial courts. Structural unification would reduce the number of trial courts in our State by consolidating each county's courts into one court of general jurisdiction. Each court would be comprised of the number of judges deemed necessary to handle that county's expected caseload. While the court would be staffed with the necessary personnel, positions that overlap in our current system would be eliminated. Each court would be overseen by an administrator who would be responsible for managing the cases entrusted to that court.

Structural unification and centralized administration would increase flexibility and result in greater efficiency for each county's system.¹⁰³ For example, under our current system, every county has a number of autonomous trial courts, each comprised of a judge and the necessary support staff. Each judge receives cases within his court's jurisdiction, but there can be a wide disparity between the caseloads of various courts within the county.¹⁰⁴ However, after unification, all of the judges in the county would be members of one court of general jurisdiction. In that system, the court's central administrator could assign cases based on each judge's docket, and these cases could easily be transferred between judges. This would increase the overall efficiency of the

100. I do not mean to downplay significant advances that have been made in the administration of our judicial system. For example, implementing the weighted caseload measurement system, adopting Administrative Rule 1, which allows for county caseload allocation, IND. R. CT. ADMIN. R. 1(E) (effective Jan. 1, 2006), and increasing judicial compensation demonstrate considerable progress. However, there has been little movement toward statewide structural unification, which the JSC proposed in 1966, or state funding, which the CTC proposed in 1988.

101. During the 2008 legislative session, Indiana House Representative Dave Crooks plans to introduce a bill assigning the Kernan-Shepard recommendations to a 2008 summer study committee. Bryan Corbin, *Lawmakers Push Reform*, EVANSVILLE COURIER & PRESS, Dec. 27, 2007, at 1, available at <http://courierpress.com/news/2007/dec/27/lawmakers-push-reform>.

102. I do not address the selection of trial court judges for the unified system in this Article.

103. See Baker, *supra* note 4, at 235; Dosai et al., *supra* note 37, at 1297-98.

104. See Baker, *supra* note 4, at 234-35.

system, as shown by the remarkable results reported by the St. Joseph Superior Court only one year after unification.¹⁰⁵

Reports on the Minnesota court system indicate that structural unification would not preclude a county from specializing its courts or rotating judges.¹⁰⁶ For example, if a county is aware that it has a high number of rental properties that result in frequent landlord-tenant disputes, the county could allocate resources to those cases by assigning one judge to deal exclusively with landlord-tenant matters.¹⁰⁷ Alternatively, the judges could rotate to that subject matter.¹⁰⁸ Court specialization and judge rotation do not defeat the purpose of structural unification because all of the judges are still members of the same court. This flexibility makes it easier for the county administrator to allocate cases between the judges and shift resources where they are needed to increase efficiency. As emphasized by the SCC, each county will have the responsibility to determine exactly how its unified system operates, and the local judges, county administrator, and members of the bar should work together to structure a system based on their county's specific needs.¹⁰⁹

Unifying the state court system would also include unifying county probation departments. Currently, probation officers are trial court employees who are subject to the appointment and supervisory powers of the courts they serve.¹¹⁰ Although some counties have already unified their probation services, a number of counties still have multiple probation departments with each working for a different court.¹¹¹ For a more effective system, each county's probation department should be unified with the county's court of general jurisdiction. Thus, although the same number of probation officers would be needed, only one paymaster would be necessary to administer the system.

On a statewide level, the unified courts would be administered by the Indiana Supreme Court, which would have the authority to adopt rules concerning the employment and management of court personnel. The Indiana Supreme Court's Division of State Court Administration would have additional responsibilities and would be responsible for overseeing each county's court administrator. The Division of State Court Administration would work with local court administrators to collectively address problems that affect counties throughout Indiana. This collaboration would improve the state's entire judicial system by combining the minds and resources of Indiana's public officials statewide.

105. See *supra* note 55 and accompanying text.

106. See *supra* note 37 and accompanying text.

107. See Dosal et al., *supra* note 37, at 1298.

108. *Id.*

109. See *supra* Part V.

110. SUPREME COURT OF IND., 2006 INDIANA JUDICIAL SERVICE REPORT: HONORED TO SERVE, VOLUME III: FINANCIAL REPORT 5, available at <http://www.in.gov/judiciary/admin/courtmgmt/stats/2006/v3/intro.pdf>.

111. *Id.*

B. State Funding

Shifting primary responsibility for funding Indiana's trial court system from the counties to the State would improve the judiciary's ability to allocate resources where they are needed most. Centralized funding would provide local courts with reliable resources to meet the needs of the people they serve. While urban counties will undoubtedly receive more money than their rural counterparts because of higher populations and caseloads, the State would need to develop a system to allocate resources proportionately, for example, based on the number of judges and cases per county. Equalized distribution would guarantee that money is apportioned consistently, based on each county's demand, instead of on a county's ability to generate revenue.

Statistical data show that the State has increased its share of the total amount of trial court expenditures over the past ten years.¹¹² In 1997, local governments financed 70% of the trial courts' operating expenses, and the State financed the remaining 30%.¹¹³ In 2006, local governments financed 64% of the trial courts' operating expenses, and the State financed the remaining 36%.¹¹⁴ Although this 6% increase¹¹⁵ over ten years may not initially appear significant, counties likely raised property taxes and court costs to cover the expenditure boom. However, those means of generating capital have likely hit a ceiling, as demonstrated by the substantial public outcry about recent property tax increases.¹¹⁶ Consequently, the State will likely be expected to carry an even larger percentage of the bill when local governments are no longer able to generate enough revenue to subsidize the ever-increasing expenditures.

Because the State will be called on to fund a larger percentage of the trial court system's expenditures, it logically follows that the State should have control over the administration and distribution of the funds. By shifting the entire burden to the State, a centralized entity would administer the funds and guarantee a more equal distribution, as detailed above.¹¹⁷ Additionally, centralized administration would provide more transparency to track court spending, increasing accountability and raising confidence in the judicial system.

In a centralized system, the State would fund the salaries of court staff, thus eliminating contentious salary disputes between trial courts and county commissioners. While there would be a base salary for each court position, salaries would be adjusted for cost of living differences between counties. For example, the Division of State Court Administration would calculate a general base salary for court reporters. That salary would be adjusted upward or downward based on the cost of living in the county where the employee works. Because structural unification would eliminate overlapping jobs, theoretically,

112. See IJSR REPORT, VOL. I, *supra* note 12, at 183.

113. *Id.*

114. *Id.*

115. Adjusted for inflation, in 2006, the State spent \$52,952,343 more on the trial court system than it did in 1997. *Id.*

116. See *supra* notes 84, 96 and accompanying text.

117. See *supra* Part II; *supra* notes 42-44 and accompanying text.

this method of compensating local employees would result in equal pay for equal work throughout Indiana.

Finally, state funding would increase the collective amount of money available for major capital expenditures and programming initiatives that would typically be beyond the reach of individual counties. For example, state funding could provide all local courts with access to a statewide computer system that would centralize case information and eliminate information gaps by storing data in one database.¹¹⁸ This would make it easier for courts to determine if parties have related cases pending in other jurisdictions. Additionally, state funding would increase the trial courts' collective purchasing power and save money. For example, items all trial courts need—office supplies, forms, books, recording devices, office furnishings, computers, printers, fax machines, etc.—could be purchased in mass quantities, lowering the cost per unit and resulting in substantial savings.

CONCLUSION

After conducting extensive research on structural unification and state funding, one theme resonates with both topics—the proverbial whole is greater than the sum of its parts. Indiana's disjointed court system would operate more efficiently if it were structurally unified and administered at the local level by a central administrator and on the state level by a central agency. State funding would equalize resources by allocating money proportionately throughout the state while combining resources to collectively address initiatives that would otherwise be beyond the reach of individual counties.

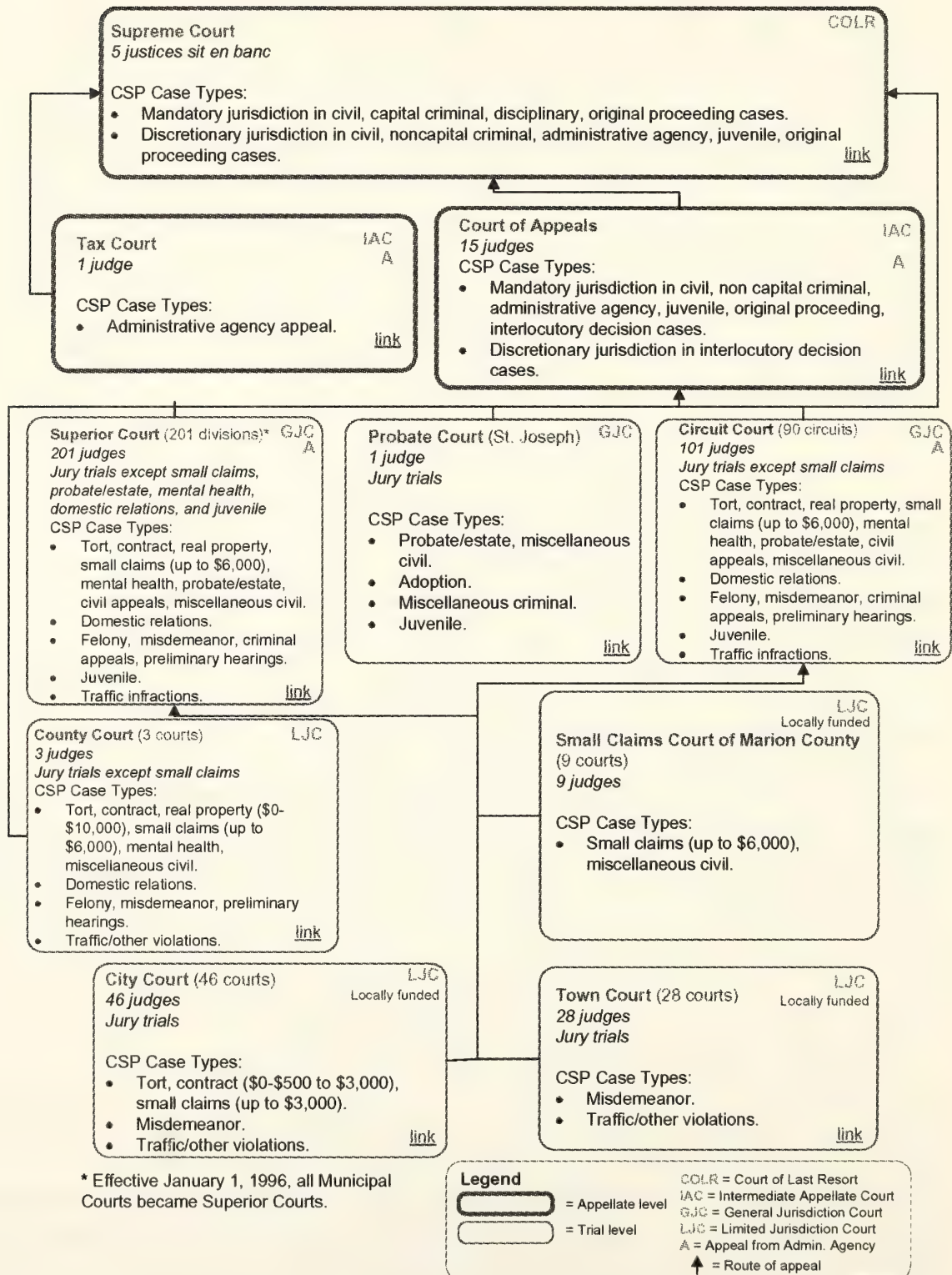
As Chief Justice Shepard recently proclaimed, we are “a judiciary with reform in its heart.”¹¹⁹ Structural unification and state funding are the tools Indiana needs to modernize its court system and join the twenty-first century. Now is the time to implement the reforms that Indiana's scholars and public officials have been advocating for decades.

118. I applaud the success of the Judicial Technology and Automation Committee's (“JTAC”) Odyssey Case Management System, which recently linked court and clerk officials in participating Monroe County and Marion County courts. JTAC plans “a statewide rollout occurring over the next several years.” Press Release, Judicial Tech. and Automation Comm., December “Go Live” Set For First Odyssey CMS Sites: Statewide System to Launch in Monroe County and Washington Township, Marion County (Dec. 19, 2007), *available at* <http://www.in.gov/judiciary/jtac/news/cms-golive2007.html>.

119. Randall T. Shepard, Chief Justice, Ind. Supreme Court, 2008 State of the Judiciary Address: “A Court with Reform in Its Heart” (Jan. 16, 2008), *available at* <http://www.in.gov/judiciary/supreme/stjud/2008.html>.

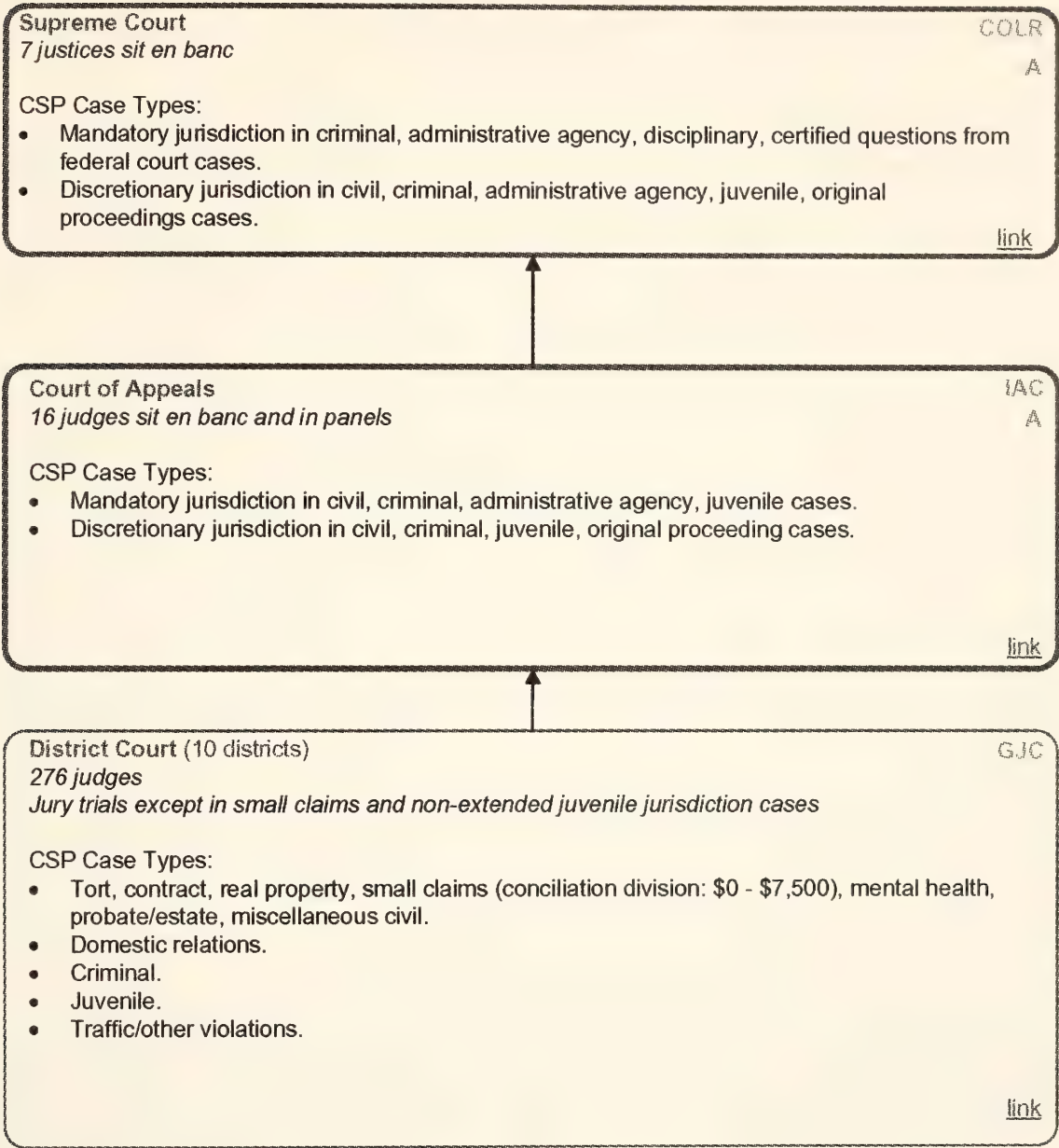
Indiana

(Court structure as of Calendar Year 2007)


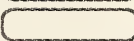


Minnesota

(Court structure as of Calendar Year 2007)



Legend

-  = Appellate level
-  = Trial level

COLR = Court of Last Resort
IAC = Intermediate Appellate Court
GJC = General Jurisdiction Court
LJC = Limited Jurisdiction Court
A = Appeal from Admin. Agency

↑ = Route of appeal

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2007*

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CARL BUTLER****

It would be unfair to measure the contribution of any of the justices of the Indiana Supreme Court simply by the numbers of opinions they hand down or the statistics pertaining to their voting record. All five justices serve in a number of capacities and they are public servants in the truest sense of the term. For instance, Chief Justice Shepard is not only the head of the state's judiciary and involved in administering the various administrative functions served by an entire branch of government, he also recently served as co-chair of a statewide committee examining important local government reform issues.¹ As another example, Justice Sullivan heads the committee charged with the monumental and important task of updating and integrating the state's judicial records and case management systems across all 92 of Indiana's counties.² Almost all of the justices teach (or have taught) law and serve the public in capacities beyond their work in handing down the court's appellate opinions.

Moreover, handing down opinions is not even the only judicial duty placed on the justices. In addition to overseeing the judicial and attorney disciplinary systems and hearing oral argument in virtually all of their cases, the justices must also review more than 900 transfer petitions in a year. Given that each petition to transfer typically involves three rounds of briefing (as well as the accompanying merits briefs filed in the Indiana Court of Appeals), petitions to transfer alone require the justices to read more than 2700 briefs in a single year, a Sisyphian task on top of their existing caseloads. Indeed, the number of

* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

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1. Press Release, Ind. Comm'n on Local Gov't Reform, Indiana Commission on Local Government Releases Report (Dec. 11, 2007), <http://www.in.gov/judiciary/supreme/dlgf-release.html>.

2. Judicial Technology and Automation Committee, <http://www.in.gov/judiciary/committees/jtac.html> (last visited June 25, 2008).

petitions has continued to skyrocket. In 2005 and 2006, the court ruled on 907 and 926 petitions to transfer, respectively. That number rose again in 2007, as the court addressed 951 petitions to transfer. Just five years ago, litigants filed only 655 petitions to transfer. In other words, the court has received an annual increase of 60 additional transfer petitions in each of the past five years. The practical effect of this increase is a reduced chance that any given case will be granted transfer. As recently as 2002, the court granted transfer 15% of the time (including 23% of petitions in civil cases). As the number of petitions continues to rise, the percentage chance that any one case will be granted transfer has dropped. In 2007, only 7% of all petitions to transfer were granted (including just 10% of petitions filed in civil cases).

Given the workload placed on each of the justices, it is hardly surprising that the number of opinions the court hands down continues to drop. In 2007, the court handed down 78 opinions, the lowest total in the past five years. For reasons already discussed, it would of course be unfair to credit this drop to the effort of the justices. The primary cause—beyond the many other demands on the justices' time—appears to be an unusual number of death penalty and life without parole cases coming before the court at the same time in 2007. The court reviewed 16 different cases in 2007 in which the sentence was either death or life in prison without parole. It heard more direct criminal appeals in 2007 than in the two previous years combined. There were five direct appeals of death sentences alone, up from only two the year before.

The court is precise and careful in opinions including the sentence of death or life in prison without parole because of the gravity of these cases. One example of the detailed work the court puts into these cases is the 47-page opinion in *Overstreet v. State*.³ Justice Rucker's opinion for the court itself spanned 40 pages and addressed in detail no less than 20 different issues. Although most opinions do not produce a single dissenting or concurring opinion, the *Overstreet* case produced three, as all but one justice wrote on at least one aspect of the case. Obviously, the amount of attention and care that goes into such a case far exceeds that of cases where the consequences are less severe.

In addition, the court places great care to achieve consensus in its cases to the extent that consensus is possible. As with any other consensus-building process, achieving these results can take time and effort. The results of this work certainly showed in 2007, as 74.4% of the court's decisions were unanimous, the highest total since 2004. Moreover, only 10 of the court's opinions were so-called "split decisions" in which a single vote the other way would have changed the result.

Table A. The court issued 78 opinions in 2007, down from 106 in 2006, 132 in 2005, and 92 in 2004. This number marked the lowest in any of the past five years. In 2002, before the effects of the change in the court's jurisdiction were fully felt, the court handed down 190 opinions, more than in 2007 and 2006

3. 877 N.E.2d 144 (Ind. 2007).

combined. Chief Justice Shepard authored the most opinions with 18, while Justice Rucker had the least at nine opinions. The year also saw more criminal opinions than civil for the first time since 2002.

Table B-1. In perhaps the strongest example yet of how much variation in voting patterns can exist from year-to-year, Justices Rucker and Sullivan were the two most aligned justices in civil cases, agreeing 91.4% of the time. In 2006, however, they had the least amount of alignment in civil cases, as they only voted together in 73% of civil cases. In the previous three years, they never agreed more than 80% of the time. The nature and outcome of cases that come before the court obviously influences these patterns.

In previous years, this Article had noted a trend in alignment between Chief Justice Shepard, Justice Boehm, and Justice Sullivan in civil cases. That trend remained true to an extent in 2007, as Chief Justice Shepard and Justice Sullivan were aligned in 88.6% of all civil cases. Similarly, Chief Justice Shepard and Justice Boehm were aligned in 80% of civil cases. However, the alignment between Justices Sullivan and Boehm dropped from 87.3% in 2006 (tied for the highest for that year) to just 77.1% in 2007, which was tied for the lowest amount of agreement of any two justices for 2007.

Table B-2. Justices Sullivan and Boehm found more agreement in criminal cases, where they agreed the most of any two justices at 93% of the time. Given the complexity and importance of the issues in the criminal cases before the court in 2007, the justices displayed a remarkable amount of consensus. The lowest percentage of agreement between any two justices was only 86%. By comparison, the lowest percentages were 71.7% and 72.9% in 2006 and 2005, respectively.

Table B-3. When looking at all cases, Justice Sullivan was aligned with either the Chief Justice or Justice Rucker in 89.7% of all cases, which tied for the most of any voting alignment. In previous years, Justice Sullivan had aligned with Justice Rucker 78.9% and 79.5% of the time spread over all cases. As an indicator of how well the court was able to build consensus in 2007, no two justices aligned together in less than 83.3% of the cases in 2007, while that occurred more than 15 times over the course of the past three years.

Table C. The percentage of unanimous opinions remained high for 2007, as 74.4% of the court’s opinions drew neither a dissent nor a concurring opinion. This figure is a slight increase from 2005 (67%) and 2006 (64.3%). Civil cases were far more likely to draw a dissenting opinion, as 11 of the court’s 35 civil cases included a dissenting opinion, while a mere five of the court’s 43 criminal cases drew a dissent.

Table D. The total number of split decisions dropped again in 2007, as this time the court split in only 10 cases. The court issued 21 split decisions in 2005, and that number dropped to 11 in 2006.

Table E-1. As has typically been the case, the court continues to reverse the lower courts in almost all cases in which it grants transfer. The court reversed in 93.5% of the civil transfer cases it handed down in 2007. Criminal transfer cases fared slightly better, as the court reversed in only 74.2% of those cases.

Table E-2. An immense amount of the court's work rests in reviewing the high number of transfer petitions that come before it. In 2007, litigants filed 951 petitions for transfer, up from the 926 filed in 2006. Civil petitions had a slightly higher chance of being granted, as the court granted 10.7% of civil petitions and only 5.3% of all criminal petitions.

Table F. The court continues to show a remarkable breadth in the type and complexity of cases that it decides. The court handed down opinions addressing more than 20 different areas of law in 2007. The topics addressed by the court in 2007 stretch from family and property law to complex issues under the Indiana and federal constitutions. The court also continues to show its ability to revisit certain areas of law that might need updating as warranted by a court of last resort. For instance, for years the court infrequently addressed insurance law, typically handing down only a single case in a given year. However, insurance issues have come to be a hot topic for the court. The court handed down six insurance cases in 2006 and another three in 2007. Last year, this survey predicted that environmental law might be a ripe topic in that the court had not handed down an environmental law opinion since 2004. The court did exactly that in 2007. In this vein, it would appear the Uniform Commercial Code ("U.C.C.") might be an area ripe for the court to revisit. The court handed down no U.C.C. cases in 2007 and has handed down only a single case that focused primarily on that body of law since 2003.

TABLE A
OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	9	9	18	3	1	4	0	3	3
Dickson, J.	11	6	17	1	0	1	1	3	4
Sullivan, J.	5	10	15	0	0	0	1	2	3
Boehm, J.	10	7	17	0	1	1	1	5	6
Rucker, J.	7	2	9	0	0	0	3	0	3
Per Curiam	1	1	2						
Total	43	35	78	4	2	6	6	13	19

^a These are opinions and votes on opinions by each justice and in per curiam in the 2007 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. See *id.* at 210.

^b This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions.

^c This category includes both written concurrences, joining in written concurrence, and votes to concur in result only.

^d This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^e

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		27	30	27	30
	S		0	1	1	0
	D	---	27	31	28	30
	N		35	35	35	35
	P		77.1%	88.6%	80.0%	85.7%
Dickson, J.	O	27		27	27	28
	S	0		0	3	0
	D	27	---	27	30	28
	N	35		35	35	35
	P	77.1%		77.1%	85.7%	80.0%
Sullivan, J.	O	30	27		27	31
	S	1	0		0	1
	D	31	27	---	27	32
	N	35	35		35	35
	P	88.6%	77.1%		77.1%	91.4%
Boehm, J.	O	27	27	27		28
	S	1	3	0		0
	D	28	30	27	---	28
	N	35	35	35		35
	P	80.0%	85.7%	77.1%		80.0%
Rucker, J.	O	30	28	31	28	
	S	0	0	1	0	
	D	30	28	32	28	---
	N	35	35	35	35	
	P	85.7%	80.0%	91.4%	80.0%	

^e This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 27 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES^f

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		38	39	39	37
	S		1	0	0	0
	D	---	36	39	39	37
	N		43	43	43	43
	P		90.7%	90.7%	90.7%	86.0%
Dickson, J.	O	38		38	39	37
	S	1		0	0	0
	D	39	---	38	39	37
	N	43		43	43	43
	P	90.7%		88.4%	90.7%	86.0%
Sullivan, J.	O	39	38		40	38
	S	0	0		0	0
	D	39	38	---	40	38
	N	43	43		43	43
	P	90.7%	88.4%		93.0%	88.4%
Boehm, J.	O	39	39	40		40
	S	0	0	0		0
	D	39	39	40	---	40
	N	43	43	43		43
	P	90.7%	90.7%	93.0%		93.0%
Rucker, J.	O	37	37	38	40	
	S	0	0	0	0	
	D	37	37	38	40	---
	N	43	43	43	43	
	P	86.0%	86.0%	88.4%	93.0%	

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 38 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES[§]

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		65	69	66	67
	S		1	1	1	0
	D	---	66	70	67	67
	N		78	78	78	78
	P		84.6%	89.7%	85.9 %	85.9 %
Dickson, J.	O	65		65	66	65
	S	1		0	3	0
	D	66	---	65	69	65
	N	78		78	78	78
	P	84.6 %		83.3%	88.5 %	83.3 %
Sullivan, J.	O	69	65		67	69
	S	1	0		0	1
	D	70	65	---	67	70
	N	78	78		78	78
	P	89.7 %	83.3 %		85.9 %	89.7 %
Boehm, J.	O	66	66	67		68
	S	1	3	0		0
	D	67	69	67	---	68
	N	78	78	78		78
	P	85.9%	88.5 %	85.9%		87.2 %
Rucker, J.	O	67	65	69	68	
	S	0	0	1	0	
	D	67	65	70	68	--
	N	78	78	78	78	
	P	85.9%	83.3%	89.7 %	87.2%	

[§] This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 65 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 2007. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C
UNANIMITY
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES^h

Unanimous ⁱ			Unanimous with Concurrence ^j			Opinions with Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
34	24	58 (74.4%)	4	0	4 (5.1%)	5	11	16 (20.5%)	78

^h This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percentage of overall opinions with concurrence and overall opinions with dissent.

ⁱ A decision is considered unanimous only when all justices participating in the case voted to concur in the court’s opinion as well as its judgment. When one or more justices concurred in the result, but not in the opinion, the case is not considered unanimous.

^j A decision is listed in this column if one or more justices concurred in the result, but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D
3-2 DECISIONS^k

Justices Constituting the Majority	Number of Opinions ^l
1. Shepard, C.J., Sullivan, J., Rucker, J.	2
2. Shepard, C.J., Dickson, J., Sullivan, J.	2
3. Shepard, C.J., Dickson, J., Boehm, J.	1
4. Sullivan, J., Boehm, J., Rucker, J.	1
5. Shepard, C.J., Sullivan, J.	1
6. Dickson, J., Boehm, J.	1
7. Sullivan, J., Rucker, J.	1
8. Rucker, J.	1
Total ^m	10

^k This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

^l This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

^m The 2007 term’s 3-2 decisions were:

1. Shepard, C.J., Sullivan, J., Rucker, J.: *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021 (Ind. 2007) (Shepard, C.J.); *Grant v. Hager*, 868 N.E.2d 801 (Ind. 2007) (Sullivan, J.).
2. Shepard, C.J., Dickson, J., Sullivan, J.: *State v. Azania*, 875 N.E.2d 701 (Ind. 2007) (Sullivan, J.); *State v. McManus*, 868 N.E.2d 778 (Ind. 2007) (Shepard, C.J.).
3. Shepard, C.J., Dickson, J., Boehm, J.: *Jackson v. State*, 868 N.E.2d 494 (Ind. 2007) (Boehm, J.)
4. Sullivan, J., Boehm, J., Rucker, J.: *Stephenson v. State*, 864 N.E.2d 1022 (Ind. 2007) (Boehm, J.).
5. Shepard, C.J., Sullivan, J.: *Israel v. Ind. Dept. of Corr.*, 868 N.E.2d 1123 (Ind. 2007) (Sullivan, J.).
6. Dickson, J., Boehm, J.: *Kho v. Pennington*, 875 N.E.2d 208 (Ind. 2007) (Dickson, J.).
7. Sullivan, J., Rucker, J.: *Util. Ctr., Inc. v. City of Ft. Wayne*, 868 N.E.2d 453 (Ind. 2007) (Sullivan, J.).
8. Rucker, J.: *Overstreet v. State*, 877 N.E.2d 144 (Ind. 2007) (Rucker, J.).

TABLE E-1
DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALSⁿ

	Reversed or Vacated ^o	Affirmed	Total
Civil Appeals Accepted for Transfer	29 (93.5%)	2 (6.5%)	31
Direct Civil Appeals	0 (0.0%)	3 (100%)	3
Criminal Appeals Accepted for Transfer	23 (74.2%)	8 (25.8%)	31
Direct Criminal Appeals	5 (41.7%)	7 (58.3%)	12
Total	57 (74.0%)	20 (26.0%)	77 ^p

ⁿ Direct criminal appeals are cases in which the trial court imposed a death sentence. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 56, 63 (pursuant to Rules of Procedure for Original Actions). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 57.

^o Generally, the term “vacate” is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term “reverse” is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically “vacates” every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 58(A). As a practical matter, “reverse” or “vacate” simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

^p This does not include one attorney discipline opinion. This opinion did not reverse, vacate, or affirm any other court’s decision.

TABLE E-2
DISPOSITION OF PETITIONS TO TRANSFER
TO SUPREME COURT IN 2007^q

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil ^r	268 (89.3%)	32 (10.7%)	300
Criminal ^s	570 (94.7%)	32 (5.3%)	602
Juvenile	45 (91.8%)	4 (8.2%)	49
Total	883 (92.8%)	68 (7.2%)	951

^q This Table analyzes the disposition of petitions to transfer by the court. *See* IND. APP. R. 58(A).
^r This also includes petitions to transfer in tax cases and workers' compensation cases.
^s This also includes petitions to transfer in post-conviction relief cases.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^t

Original Actions	Number
• Certified Questions	0
• Writs of Mandamus or Prohibition	0
• Attorney Discipline	1 ^u
• Judicial Discipline	0
Criminal	
• Death Penalty	5 ^v
• Fourth Amendment or Search and Seizure	3 ^w
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	0
Trusts, Estates, or Probate	1 ^x
Real Estate or Real Property	5 ^y
Personal Property	0
Landlord-Tenant	0
Divorce or Child Support	4 ^z
Children in Need of Services (CHINS)	0
Paternity	0
Product Liability or Strict Liability	1 ^{aa}
Negligence or Personal Injury	3 ^{bb}
Invasion of Privacy	0
Medical Malpractice	2 ^{cc}
Indiana Tort Claims Act	2 ^{dd}
Statute of Limitations or Statute of Repose	1 ^{ee}
Tax, Department of State Revenue, or State Board of Tax Commissioners	1 ^{ff}
Contracts	1 ^{gg}
Corporate Law or the Indiana Business Corporation Law	1 ^{hh}
Uniform Commercial Code	0
Banking Law	0
Employment Law	0
Insurance Law	3 ⁱⁱ
Environmental Law	1 ^{jj}
Consumer Law	0
Workers' Compensation	1 ^{kk}
Arbitration	0
Administrative Law	1 ^{ll}
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	0
Indiana Constitution	16 ^{mm}

^t This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 2007. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. Also, any attorney discipline case resolved by order (as opposed to an opinion) was not considered in preparing this Table.

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- ^u *In re Anonymous*, 876 N.E.2d 333 (Ind. 2007).
- ^v *Overstreet v. State*, 877 N.E.2d 144 (Ind. 2007); *State v. Azania*, 875 N.E.2d 701 (Ind. 2007); *Baer v. State*, 866 N.E.2d 752 (Ind. 2007); *Kubsch v. State*, 866 N.E.2d 726 (Ind. 2007); *State v. Azania*, 865 N.E.2d 994 (Ind. 2007).
- ^w *Clarke v. State*, 868 N.E.2d 114 (Ind. 2007); *Grier v. State*, 868 N.E.2d 443 (Ind. 2007); *Row v. Holt*, 864 N.E.2d 1011 (Ind. 2007).
- ^x *In re Guardianship of E.N.*, 877 N.E.2d 795 (Ind. 2007).
- ^y *Parcels Sold for Delinquent Taxes v. Michiana Campgrounds, LLC*, 873 N.E.2d 1051 (Ind. 2007); *St. Charles Tower, Inc. v. Bd. of Zoning Appeals of Evansville*, 873 N.E.2d 598 (Ind. 2007); *City of Carmel v. Certain S.W. Clay Twp. Annexation Territory Landowners*, 868 N.E.2d 793 (Ind. 2007); *Util. Ctr., Inc. v. City of Ft. Wayne*, 868 N.E.2d 453 (Ind. 2007); *City of Carmel v. Steele*, 865 N.E.2d 612 (Ind. 2007).
- ^z *Cubel v. Cubel*, 876 N.E.2d 1117 (Ind. 2007); *Grant v. Hager*, 868 N.E.2d 801 (Ind. 2007); *Lambert v. Lambert*, 861 N.E.2d 1176 (Ind. 2007); *Whited v. Whited*, 859 N.E.2d 657 (Ind. 2007).
- ^{aa} *Ford Motor Co. v. Rushford*, 868 N.E.2d 806 (Ind. 2007).
- ^{bb} *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021 (Ind. 2007); *Ford Motor Co. v. Rushford*, 868 N.E.2d 806 (Ind. 2007); *Penn Harris Madison Sch. Corp. v. Howard*, 861 N.E.2d 1190 (Ind. 2007).
- ^{cc} *Kho v. Pennington*, 875 N.E.2d 208 (Ind. 2007); *Mullins v. Parkview Hosp., Inc.*, 865 N.E.2d 608 (Ind. 2007).
- ^{dd} *Giles v. Brown County*, 868 N.E.2d 478 (Ind. 2007); *Hochstetler v. Elkhart County Highway Dep't*, 868 N.E.2d 425 (Ind. 2007).
- ^{ee} *Porter County Sheriff Dep't v. Guzorek*, 862 N.E.2d 254 (Ind. 2007).
- ^{ff} *Parcels Sold for Delinquent Taxes v. Michiana Campgrounds, LLC*, 873 N.E.2d 1051 (Ind. 2007).
- ^{gg} *Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007).
- ^{hh} *Lean v. Reed*, 876 N.E.2d 1104 (Ind. 2007).
- ⁱⁱ *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021 (Ind. 2007); *State Farm Mut. Auto. Ins. Co. v. Gutierrez*, 866 N.E.2d 747 (Ind. 2007); *Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 865 N.E.2d 571 (Ind. 2007).
- ^{jj} *Cinergy Corp.*, 865 N.E.2d 571.
- ^{kk} *Ind. Ins. Guar. Ass'n v. Bedford Reg'l Med. Ctr.*, 863 N.E.2d 308 (Ind. 2007).
- ^{ll} *J.D. v. State*, 859 N.E.2d 341 (Ind. 2007).
- ^{mm} *Hollin v. State*, 877 N.E.2d 462 (Ind. 2007); *Overstreet v. State*, 877 N.E.2d 144 (Ind. 2007); *Reid v. State*, 876 N.E.2d 1114 (Ind. 2007); *Kho v. Pennington*, 875 N.E.2d 208 (Ind. 2007); *Clark County Council v. Donahue*, 873 N.E.2d 1038 (Ind. 2007); *Krempetz v. State*, 872 N.E.2d 605 (Ind. 2007); *Clarke v. State*, 868 N.E.2d 1114 (Ind. 2007); *Jackson v. State*, 868 N.E.2d 494 (Ind. 2007); *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007); *Giles v. Brown County*, 868 N.E.2d 478 (Ind. 2007); *Vasquez v. State*, 868 N.E.2d 473 (Ind. 2007); *Grier v. State*, 868 N.E.2d 443 (Ind. 2007); *Biddinger v. State*, 868 N.E.2d 407 (Ind. 2007); *Bradley v. State*, 867 N.E.2d 1282 (Ind. 2007); *State v. Azania*, 865 N.E.2d 994 (Ind. 2007); *J.D. v. State*, 859 N.E.2d 341 (Ind. 2007).

DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: APPELLATE RULE AMENDMENTS, REMARKABLE CASE LAW, AND REFINING OUR INDIANA PRACTICE

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INTRODUCTION

This Article will briefly explain the 2007 amendments to the Indiana Rules of Appellate Procedure (the “Rules”). This Article will also undertake a retrospective look at remarkable cases from this past reporting period, which specifically address intricacies of the Rules as they are applied in everyday appellate practice. This Article will conclude by highlighting appellate orders that provide practitioners with tips on how to refine their appellate practices.

I. APPELLATE RULE AMENDMENTS

This past year the Indiana Supreme Court amended Rules 14, 15, 22, 23, 43, 57, and 63.¹ The new rules were effective as of January 1, 2008.²

A. Rules 14, 15, and 57(B) Jurisdiction over Interlocutory Order in Class Action Certification

Under new Rule 14, the court of appeals may, in its discretion, accept jurisdiction over an appeal from an interlocutory order granting or denying class action certification under Indiana Trial Rule 23.³ A motion requesting the court

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1. See Order Amending Rules of Appellate Procedure (Ind. Sept. 10, 2007) (No. 94S00-0702-MS-49); Order Amending Rules of Appellate Procedure (Ind. Sept. 12, 2007) (No. 94S00-0702-MS-49); Order Amending Order Amending Rules of Appellate Procedure (Ind. Sept. 27, 2007) (No. 94S00-0702-MS-49).

2. See sources cited *supra* note 1.

3. Order Amending Rules of Appellate Procedure (Ind. Sept. 10, 2007) (No. 94S00-0702-MS-49), available at <http://www.in.gov/judiciary/orders/rule-amendments/2007/appellate-091007.pdf>.

of appeals to exercise this discretion must be filed within thirty days of the entry of the order and shall state (i) the date of the order granting or denying the class action certification, (ii) the facts necessary for consideration of the motion, and (iii) the reasons the court of appeals should accept the interlocutory appeal.⁴ A copy of the trial court's order granting or denying the class action shall be attached to the motion requesting that the court of appeals accept jurisdiction over the interlocutory appeal, and any response to such a motion shall be filed within fifteen days after the motion was served.⁵ If jurisdiction is accepted by the court of appeals, the appellant shall file a Notice of Appeal with the trial court clerk within fifteen days of the court of appeals's order and shall also comply with Rule 9(E).⁶

To comply with the Rule 14 amendment, Rules 15 and 57 were also amended. Rule 15 was amended to include a "Class Action Certification Interlocutory Appeal under Rule 14(C)" as an appeal that requires its Appellant's Case Summary to be filed at the time the motion requesting permission to file the interlocutory appeal is filed in the court of appeals—as opposed to the thirty days after the filing of the Notice of Appeal generally allotted to an appellant.⁷ Likewise, Rule 57(B), which addresses "Decisions From Which Transfer May be Sought," was amended to include the newly formed 14(C) class action certification interlocutory appeal as the type that "shall not be considered an adverse decision for the purpose of petitioning to transfer, regardless of whether rehearing by the Court of Appeals was sought."⁸

B. Rule 22—Citation to County Local Rules

The amendment to Appellate Rule 22 provides practitioners with the proper citation form for County Local Rules. The amendment provides that "[c]itations to County Local Court Rules adopted pursuant to Ind[iana] Trial Rule 81 shall be cited by giving the county followed by the citation to the local rule, e.g. Adams LR01-TR3.1-1."⁹

C. Rule 23—Appellate Filing

Section E was added to Rule 23, which governs appellate filing, and provides as follows:

(E) Signature Required. Every motion, petition, brief, appendix, acknowledgment, notice, response, reply, appearance, or appellant's case summary must be signed by at least one [1] attorney of record in the attorney's individual name, whose name, address, telephone number, and

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

attorney number shall also be typed or printed legibly below the signature. If a party or amicus is not represented by an attorney, then the party or amicus shall sign such documents and type or print legibly the party or amicus's name, address, and telephone number. The signing of the verification of accuracy required by Rule 50(A)(2)(i) or 50(B)(1)(f) satisfies this requirement for appendices.¹⁰

D. Rule 43—Acceptable Fonts and Digital Filing

Perhaps the change most anticipated by appellate practitioners came by way of an amendment to Rule 43. New Rule 43(D) adds Baskerville, Book Antiqua, Bookman, Bookman Old Style, Century, Century Schoolbook, Garamond, Georgia, New Baskerville, New Century Schoolbook, and Palatino to the list of acceptable fonts for appellate briefs and petitions to transfer.¹¹ Even more interesting was the amendment that changed section K of Rule 43 to require that a digital copy in Word or text-searchable PDF format, as opposed to simply an electronic format, of all documents accompany papers filed in the appellate courts. This amendment also provided that the digital filing may be received by the clerk's office on a floppy disk or CD along with the paper versions or by email to the clerk's office on the same day the hard paper copies are filed.¹² Section K excuses unrepresented parties from the digital requirement.¹³ As exciting as this change was to appellate practitioners, who briefly envisioned the days of cleaner office desks and increased "Control F" searches, our supreme court soon thereafter retracted the 43(K) change, effective immediately, and tabled it for a later date.¹⁴ Presumably, the Rule 43(K) amendment is on the horizon and may be revisited in the upcoming year. The change to 43(D) was not stricken¹⁵ and is still in effect as of January 1, 2008.¹⁶

E. Rule 63: Review of Tax Court Decisions

Finally, the most dramatic amendments to the Rules were those to Rule 63

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. See Order Amending Order Amending Rules of Appellate Procedure (Ind. Sept. 27, 2007) (No. 94S0-0702-MS-49) ("The amendment to Appellate Rule 43(K) was inadvertently included in the September 10 Order and was not intended to be issued in that form at that time. We find that the portion of our September 10, 2007 Order Amending Rule of Appellate Procedure purporting to amend Appellate Rule 43(K) should be stricken."), available at <http://www.in.gov/judiciary/orders/rule-amendments/2007/rule43-092707.pdf>.

15. See *id.*

16. *Id.*; see also Order Amending Rules of Appellate Procedure (Ind. Sept. 12, 2007) (No. 94S00-0702-MS-49), available at <http://www.in.gov/judiciary/orders/rule-amendments/2007/rule63-091007.pdf>.

that addressed the review of tax court decisions.¹⁷ The amendment provides that final dispositions, as opposed to solely final judgments, of tax court decisions, can be petitioned to the supreme court for review.¹⁸ Section B now provides, “Any party adversely affected by a Final Judgment or final disposition may file a Petition for Rehearing with the tax court, not a Motion to Correct Error. Rehearings from a Final Judgment or final disposition of the Tax Court shall be governed by Rule 54.”¹⁹ Section C now requires a Notice of Intent to review a Tax Court decision in accordance with the requirements of Rule 9.²⁰ Also new to Rule 63 are sections D, E, K, and L.²¹ Section D provides that the clerk shall give notice of the Notice of Intent to Petition to the Court Reporter and shall assemble the Clerk’s Record in accordance with Appellate Rule 10, that the Court Reporter is responsible for preparing and filing the transcript in accordance with Rule 11, and that the clerk is to maintain access to the Clerk’s Record in accordance with Rule 12.²² Section E establishes the time requirements for filing a petition for review.²³ Section K provides, “Extensions of time may be sought under Rule 35 except that no extension of the time for filing the Notice of Intent to Petition for Review shall be granted.”²⁴ Finally, section L provides, “Appendices shall be filed in compliance with Rules 49, 50, and 51.”²⁵ The rest

17. See Order Amending Rules of Appellate Procedure (Ind. Sept. 12, 2007) (No. 94S00-0702-MS-49), available at <http://www.in.gov/judiciary/orders/rule-amendments/2007/rule63-091007.pdf>.

18. See *id.* Rule 63A also removed from this section the briefing requirements of a petition to transfer a tax court decision. A case reported during the reporting period highlighted that the court of appeals, like the trial courts of Indiana, lacks subject matter jurisdiction to consider cases that fall within the tax court’s exclusive jurisdiction. See *Wayne Twp. v. Ind. Dep’t of Local Gov’t Fin.*, 865 N.E.2d 625, 631 (Ind. Ct. App.) (“Decisions of the Tax Court must be appealed, if at all, directly to the Indiana Supreme Court. Thus, we do not have the luxury of considering the merits of the dispute here despite the trial court’s lack of subject matter jurisdiction, although our Supreme Court can do so even if the trial court jurisdiction was lacking The Tax Court transferred this case and the trial court ruled on it because of the parties’ joint request that the trial court consider the case. But the fact remains that parties to a case cannot, by mutual consent, confer subject matter jurisdiction upon a tribunal when the law otherwise does not confer such jurisdiction.” (citations omitted)), *trans. denied*, 878 N.E.2d 217 (Ind. 2007).

19. See Order Amending Rules of Appellate Procedure (Ind. Sept. 12, 2007) (No. 94S00-0702-MS-49), available at <http://www.in.gov/judiciary/orders/rule-amendments/2007/rule63-091007.pdf>.

20. See *id.* (Rule 63(C), formerly “Time for Filing Petition,” is now entitled “Notice of Intent to Petition for Review.” This section also now provides that Rule 25(C)’s “three-day extension for service by mail or third-party commercial carrier, does not extend the due date for filing a Notice of Intent to Petition for Review, and no extension of time shall be granted.”).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

of Rule 63 is substantially the same.²⁶

In sum, the amended Rules have significant and positive impacts for appellate practitioners. Any gray areas inadvertently created by these changes to the Rules will likely work themselves out in subsequent appellate opinions.

II. REMARKABLE CASE LAW

A. Reaffirming the Importance of the “Magic Language”

Cincinnati Insurance Co. v. Davis,²⁷ articulated no new procedural rules, but reminded appellate practitioners and trial judges of an important appellate procedural point.²⁸

Cincinnati Insurance Company and Indiana Insurers Company (collectively, the “Insurers”) filed a negligence complaint against an office building tenant (the “Doctor”), a clinic (the “Clinic”), and a water filtration company (“Culligan”) after a water leak damaged the insured property.²⁹ The Insurers had paid over \$100,000 in claims and initially filed a negligence complaint against the Doctor and Culligan.³⁰ The trial court granted the Doctor’s motion for summary judgment, finding that the Insurers had not designated evidence showing negligence or established the applicability of *res ipsa loquitor*.³¹ The order granting the motion, however, did not indicate that it was a final appealable judgment.³² Over a month before summary judgment was entered in favor of the Doctor, the Insurers filed an amended complaint adding the Clinic as a defendant, and the Clinic, without designating any evidence, responded with a motion for summary judgment of its own.³³ Subsequently, summary judgment for the Doctor had been entered, Culligan filed its motion for summary judgment, asserting that any claim of *res ipsa loquitor* must fail for the same reason it failed against the Doctor.³⁴

After Culligan filed its motion, the Insurers designated evidence in opposition to the Clinic’s motion and petitioned to certify the Doctor’s summary judgment order for interlocutory appeal.³⁵ The Insurers then designated evidence

26. It is worth noting that based on Rule 63(C)’s exclusion of Rule’s 25(C)’s three-day extension, sections F and G, formerly D and E, have stricken the extension of Rule 25(C) to briefs in response and reply briefs, respectively. *Id.* Old sections L (Briefing After Petition Granted) and M (Record Review) have been stricken entirely. *Id.*

27. 860 N.E.2d 915 (Ind. Ct. App. 2007).

28. *Id.* at 921 (noting the importance of the *magic* words “no just reason for delay” and an express wrong directory entry at judgment).

29. *Id.* at 918.

30. *Id.*

31. *Id.* at 919.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

in opposition to Culligan's motion.³⁶ The Insurers later filed a motion to reconsider the summary judgment granted in favor of the Doctor on the grounds that, even though they only alleged *res ipsa loquitor* against the Doctor, their designated evidence clearly suggested that they were proceeding on an ordinary negligence theory as well.³⁷

After a hearing, the trial court granted Culligan summary judgment ““for the same reasons”” it granted the Doctor's motion.³⁸ That order further stated, ““As there remain no pending issues, this shall be considered a final, appealable order.””³⁹ The trial court also entered an order denying the Insurers' motion to reconsider the Doctor's summary judgment order.⁴⁰ That order stated, ““As the Court has simultaneously herewith granted [Culligan's] Motion for Summary Judgment, there are no issues remaining and the granting of the Motion For Summary Judgment and Order denying the Motion To Reconsider shall be considered final, appealable Orders. The Motion to Certify Interlocutory Appeal is, accordingly, deemed moot.””⁴¹

A week later, the Insurers filed their notice of appeal as to the “final judgments” on the Doctor's and Culligan's summary judgments but did not request a transcript, and three days later, the court clerk issued a notice of completion of Clerk's Record.⁴² The Insurers requested a ruling on the Clinic's summary judgment motion. The trial court ultimately granted summary judgment in favor of the Clinic ““for the same reasons that summary judgment [was] granted in favor of [Davis] and against the [the Insureds].””⁴³ Once again, the order stated that ““as there now remain no pending issues, this shall be considered a final, appealable order.””⁴⁴ This order spurred the Insurers to amend their notice of appeal to include the Clinic's summary judgment motion, and the next day, the trial court issued a notice of completion of the Clerk's Record.⁴⁵ Three weeks later, but after a minor mix-up regarding the request of transcript,⁴⁶ the Insurers requested an extension of time to file their brief, which the court

36. *Id.*

37. *Id.*

38. *Id.* (quoting Appellants' App. at 6).

39. *Id.* (quoting Appellants' App. at 6).

40. *Id.* at 919-20.

41. *Id.* at 920 (alteration in original) (quoting Appellants' App. at 5).

42. *Id.*

43. *Id.* (alteration in original) (quoting Appellants' App. at 7).

44. *Id.* (quoting Appellants' App. at 7).

45. *Id.*

46. In the first notice of completion of transcript, which was filed by the trial court clerk before the amended notice of appeal was filed by the Insurers, the clerk stated that the transcript had not yet been completed. *Id.* This was, as the court of appeals put it, “a scrivener's error, since no transcript had been requested.” *Id.* After the amended notice of appeal was filed, the trial court clerk made the same error but two days later issued an amended notice that no transcript had been requested. *Id.*

granted.⁴⁷ The insurers filed their brief within the extended time period, and Culligan and the Doctor subsequently filed their briefs.⁴⁸ The Clinic, however, did not file a brief.⁴⁹ The Insurers timely filed a reply brief.⁵⁰

Culligan raised the question of whether the court of appeals had subject matter jurisdiction, arguing that the Insurers did not timely file their brief following the trial court's entry of summary judgment in Culligan's favor, and that brief filing timeline was tolled when the trial court issued the first notice of completion of Clerk's Record.⁵¹ The court of appeals stated that "[t]he gist of Culligan's argument is that the trial court's . . . orders as to Culligan and Davis were final judgments."⁵² The court of appeals disagreed that those orders were final despite their language to the contrary.⁵³

Trial Rule 56(C) provides in pertinent part:

A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is not just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties.⁵⁴

It has been observed that Appellate Rule 2(H) must be read in conjunction with Trial Rule 56(C).⁵⁵ Rule 2H defines a "final judgment" as one which disposes of all claims as to all parties or where the trial court expressly determines that there is no just cause for delay and in writing expressly directs an entry of partial judgment under Trial Rule 56(C) or 54(B).⁵⁶

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *See* IND. APP. R. 45(B), which provides:

The appellant's brief shall be filed no later than thirty (30) days after: (a) the date the trial court clerk . . . issues its notice of completion of Clerk's Record if the notice reports that the Transcript is complete or that no Transcript has been requested; or (b) in all other cases, the date the trial court clerk . . . issues its notice of completion of the Transcript.

52. *Cincinnati Ins.*, 860 N.E.2d at 921.

53. *Id.*

54. IND. TRIAL R. 56(C) (in part); *see also* IND. TRIAL R. 54(B), which provides:

A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment; but in other cases a judgment, decision or order as to less than all the claims and parties is not final.

55. *See* Douglas E. Cressler, *Appellate Procedure*, 36 IND. L. REV. 935, 941 (2003).

56. IND. APP. R. 2(H); *see also* IND. APP. R. 9(A) ("A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment."). Another case decided during this reporting period, while highlighting the importance

The court of appeals found that the order did not dispose of all pending issues and that the trial court did not “expressly determine” under either Trial Rule 54(B) or Trial Rule 56(C) “that ‘there is not just reason for delay’ and expressly direct entry of judgment ‘as to less than all the issues, claims or parties.’”⁵⁷ The *Cincinnati Insurance* court quoted the Indiana Supreme Court’s explanation of Trial Rule 54(B) that

certification of an order that disposes of less than the entire case *must contain the magic language of the rule. This is intended to provide a bright line so that there is no mistaking whether an interim order is or is not appealable* [A]n order becomes final and appealable under Rule 54(B) “only by meeting the requirements of T.R. 54(B). These requirements are that the trial court, in writing, *expressly determine that there is no just reason for delay* and, in writing, expressly directs entry of judgment.”⁵⁸

Accordingly, the *Cincinnati Insurance* court concluded that even though the Culligan and Davis orders each stated they were “a final and appealable order,”⁵⁹ neither order contained the “magic language” of Trial Rule 54(B) or 56(C), and therefore neither were final judgments.⁶⁰ Thus, *Cincinnati Insurance* reminds practitioners of the “powerful appellate procedural mechanisms embodied in Trial Rules 54(B) and 56(C),”⁶¹ which allow trial courts under certain conditions to craft a judgment that is final and appealable.⁶²

of the language of Trial Rule 56(C), noted that a trial court entered final judgment, and the court of appeals stressed that, in addition to Appellate Rule 2(H), it was using “final judgment” “in the context of Indiana Appellate Rule 5(A), which provides that the court ‘shall have jurisdiction in all appeals from Final Judgments’ of circuit and superior courts.” *Ins. Co. of N. Am. v. Home Loan Corp.*, 862 N.E.2d 1230, 1232 n.3 (Ind. Ct. App. 2007) (quoting IND. APP. R. 5(A)).

57. *Cincinnati Ins.*, 860 N.E.2d at 921.

58. *Id.* (quoting *Georgos v. Jackson*, 790 N.E.2d 448, 452 (Ind. 2003) (emphasis added)).

59. This language should be compared with the decision reported during this period in *State v. Young*, 855 N.E.2d 329 (Ind. Ct. App. 2006), which concluded that an order failed to discuss whether a party was

owed back pay and what the amount of damages for improperly withheld back pay would be and whether the trial court or one of the agencies below would be responsible for making that determination. In sum, the order contains no remedy to the [party]. As such, it cannot be considered a final judgment [as it lacks the “magic language” of Trial Rule 54(B)].

Id. at 333 (citing *Georgos*, 790 N.E.2d at 452).

60. *Cincinnati Ins.*, 860 N.E.2d at 921.

61. *Cressler*, *supra* note 55, at 942.

62. *See id.* Another case decided during this reporting period, but later vacated, clarified that not even the “magic language” can transform a denial of a summary judgment motion into a final, appealable order. *See Ind. Dep’t of Transp. v. Howard*, 873 N.E.2d 72, 75 (Ind. Ct. App. 2007) (“An order *denying* summary judgment is not a final appealable order, and cannot be made into one via Trial Rules 54(B) or 56(C), because no issues have been irretrievably disposed of and no rights

B. The Supreme Court “Rules” in More Ways than One

The court of appeals’s decision in *Owen County v. Indiana Department of Workforce Development*⁶³ addressed a question of law certified to it pursuant to Indiana Code section 22-4-17-13⁶⁴ from the Unemployment Insurance Review Board of the Indiana Department of Workforce Development (“Review Board”). The issue was whether the procedures described in Appellate Rule 9(A)(3) and 9(I) are the exclusive means to initiate an appeal from the Review Board or whether Indiana Code sections 22-4-17-11 and -12 govern the initiation and perfection of an appeal.⁶⁵

On the same day the Review Board also affirmed an Administrative Law Judge’s (“ALJ”) finding that the evidence did not establish that a county employee was fired for just cause, the County filed its Notice of Intent to Appeal with the Review Board.⁶⁶ The Board responded that the County had thirty days to file the notice of appeal with the court of appeals.⁶⁷

Over two months later, the County filed its Appellant’s Case Summary with the clerk of the court of appeals.⁶⁸ The clerk informed the County that it had not properly initiated its appeal, which caused the County to file a Motion for Leave to File Appeal, alleging that their Notice of Intent to Appeal contained the same content required under Appellate Rule 9(F) and was filed in a timely manner.⁶⁹ The court of appeals agreed and granted the County’s motion, conceding that, although unorthodox, the Notice of Intent to Appeal complied with Rule 9.⁷⁰

The court of appeals gave the County seven days from the date of that order to file its Appellant’s Case Summary.⁷¹ Less than three months later, the Review Board filed its certified question to the court of appeals regarding the “proper and exclusive procedure for initiating an appeal” of a Review Board decision because the statutory procedure for appealing a Review Board decision differs from generally initiating an appeal outlined by the Appellate Rules.⁷²

At issue was Indiana Code section 22-4-17-11(a):

Any decision of the review board, in the absence of appeal as

have been foreclosed by such an order,” and therefore the only way to appeal such an order is via Appellate Rule 14(B). (emphasis added)), *vacated*, 879 N.E.2d 1119 (Ind. Ct. App. 2008).

63. 861 N.E.2d 1282 (Ind. Ct. App. 2007).

64. Indiana Code section 22-4-17-13 provides that “the review board, on its own motion, may certify questions of law to the supreme court or the court of appeals for a decision and determination.” IND. CODE § 22-4-17-13 (2007).

65. *Owen County*, 861 N.E.2d at 1284.

66. *Id.* at 1285.

67. *Id.*

68. *Id.* at 1286.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

provided in this section, shall become final fifteen (15) days after the date the decision is mailed to the interested parties. The review board shall mail with the decision a notice informing the interested parties of their right to appeal the decision to the court of appeals of Indiana. The notice shall inform the parties that they have fifteen (15) days from the date of mailing within which to file a notice of intention to appeal, and that in order to perfect the appeal they must request the preparation of a transcript in accordance with section 12 of this chapter.⁷³

Section 12 provides:

(a) Any decision of the review board shall be conclusive and binding as to all questions of fact. Either party to the dispute or the commissioner may, within thirty (30) days after notice of intention to appeal as provided in this section, appeal the decision to the court of appeals of Indiana for errors of law under the same terms and conditions as govern appeals in ordinary civil actions.⁷⁴

(e) The review board may, upon its own motion, or at the request of either party upon a showing of sufficient reason, extend the limit within which the appeal shall be taken, not to exceed fifteen (15) days. In every case in which an extension is granted, the extension shall appear in the record of the proceeding filed in the court of appeals.⁷⁵

These sections conflict with Appellate Rule 9, which governs the initiation of an appeal and provides:

(3) *Administrative Appeals*. A judicial review proceeding taken directly to the Court of Appeals from an order, ruling, or decision of an Administrative Agency is commenced by filing a Notice of Appeal with the Administrative Agency within thirty (30) days after the date of the order, ruling or decision, notwithstanding any statute to the contrary.⁷⁶

Citing precedent that the Indiana Supreme Court's procedural rules trump procedural statutes,⁷⁷ and after addressing a minor skirmish between the parties over whether there was in fact a conflict,⁷⁸ the *Owen County* court rejected the

73. IND. CODE § 22-4-17-11(a) (2007).

74. *Id.* § 22-4-17-12(a).

75. *Id.* § 22-4-17-12(e).

76. IND. APP. R. 9(A)(3).

77. See *Jackson v. City of Jeffersonville*, 771 N.E.2d 703, 706 (Ind. Ct. App. 2002); see also *In re J.L.V., Jr.*, 667 N.E.2d 186, 189 (Ind. Ct. App. 1996) (stating that conflict does not require that the rule and the statute be directly opposed but rather that they are "incompatible to the extent that both could not [be applied] in a given situation" (citing *Spencer v. State*, 520 N.E.2d 106, 109 (Ind. Ct. App. 1988))).

78. *Owen County*, 861 N.E.2d at 1288. The Review Board argued that there was not necessarily a conflict because Appellate Rule 9 does "not say 'no Notice of Intent to Appeal shall

idea that the statute and the Rule could work together.⁷⁹ The appellate court noted that if it were applying section 1 of Rule 9 to the appeal, then perhaps it could agree with a harmonization theory;⁸⁰ however, because section 3 of Rule 9 was being applied, there was a direct conflict because section 3 specifically states that the date of the decision is the operative date, and under the statute the decision is not final for fifteen days after it is made.⁸¹ The court of appeals concluded that it had not been provided with any compelling reason to depart from established precedent that the Appellate Rules, created by Indiana's high court, must prevail.⁸²

Also interesting was the *Owen County* court's response to the Review Board's request that the court clarify its obligations and timelines under the Rules if it found that the Appellate Rules were controlling.⁸³ Appellate Rule 9(A)(3), unlike 9(A)(1), contains no requirement that the Notice of Appeal be served on all parties of record and the clerk of the court of appeals.⁸⁴ Because of this, the Review Board argued that after the filing of a Notice of Appeal with the administrative agency, which causes the Review Board to prepare the case's transcript, the appellant may never serve the clerk or further pursue the appeal.⁸⁵ In the Review Board's eyes, this would cause it to jump through hoops (preparing transcripts and filing Rule 10(B) and 11(B) notices with the clerk) for no purpose.⁸⁶ Citing Appellate Rule 9(I), which provides that "[i]n Administrative Agency appeals, the Notice of Appeal shall include the same contents and be handled in the same manner as an appeal from a Final Judgment in a civil case,"⁸⁷ and—despite the fact that section 3 establishes when the Notice of (an administrative) Appeal must be filed—the court concluded that the "standard" rules for civil appeals cover everything else.⁸⁸ Rule 9(A)(1) requires an appellant to serve a copy of the Notice of Appeal on the clerk and pay the filing fee at that the time of filing the 9(A)(3) Notice of Appeal,⁸⁹ and 9(H) provides that "a party must make satisfactory arrangements . . . for payment of the cost of the Transcript."⁹⁰ The *Owen County* court therefore concluded that the Rules adequately addressed the Review Board's concerns.⁹¹

Earlier in the reporting period, *Citizens Industrial Group v. Heartland Gas*

be filed'" and therefore could be harmonized with the statute. *Id.*

79. *Id.* at 1288-89.

80. *Id.*

81. *Id.* at 1289.

82. *Id.*

83. *Id.* at 1289-90.

84. *Id.* at 1289.

85. *Id.* at 1289-90.

86. *Id.*

87. IND. APP. R. 9(I).

88. *Owen County*, 861 N.E.2d at 1290.

89. IND. APP. R. 9(A)(1); *see also* IND. APP. R. 9(E).

90. IND. APP. R. 9(H).

91. *Owen County*, 861 N.E.2d at 1290.

*Pipeline, LLC*⁹² reached the same conclusion on different facts.⁹³ Citizens Industrial Group (“CIG”) had filed its notice of appeal three months after an order was issued by the Indiana Utility Regulatory Commission (“IURC”)⁹⁴ in accordance with Indiana Code section 8-1-3-2(b), which provides that

[t]he appeal shall not be submitted prior to [the] determination of the petition for rehearing, and the decision of the commission on the petition shall not be assigned as error unless the final decision, ruling or order of the commission is modified or amended as a result of the petition without further hearing ordered.⁹⁵

The court of appeals acknowledged CIG’s point that equity would seemingly “favor giving administrative agencies the same second chance to review their decisions” that is afforded to trial courts and would occasionally prevent “appellants from undertaking [a] cumbersome appeal process.”⁹⁶ Nevertheless, the court concluded that it was constrained by the language of Rule 9(A)(3), which “unequivocally” states that a party appealing an administrative agency’s order must file the notice of appeal ““within thirty (30) days after the date of the order, ruling or decision, *notwithstanding any statute to the contrary.*””⁹⁷ The appellate court found the rule and the statute “clearly incompatible,” concluded that the rule controlled, and therefore dismissed the notice of appeal as untimely under Rule 9(A)(3).⁹⁸ The court thus held that “to comply with the rules of appellate procedure, an appellant must file a notice of appeal within thirty days of the date when the agency’s order is issued, regardless of whether the party has a petition to reconsider pending before the administrative agency.”⁹⁹

Another administrative appeal addressed the interplay between a statute and the appellate rules in a slightly different context. The Review Board had determined that a former employee of the company was entitled to unemployment compensation benefits.¹⁰⁰ The court of appeals clarified a small procedural point regarding the filing of the Clerk’s Record.¹⁰¹ The Review Board had filed its notice that the Clerk’s Record had been completed, and the employer

92. 856 N.E.2d 734 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 453 (Ind. 2007).

93. *Id.* at 738.

94. *Id.* at 736 (IURC issued its order on October 5, 2005, and IG filed its notice of appeal on January 20, 2006.).

95. IND. CODE § 8-1-3-2(b) (2004).

96. *Citizens*, 856 N.E.2d at 738.

97. *Id.* (quoting IND. APP. R. 9(A)(3) (emphasis added)).

98. *Id.* (“Where there is a direct conflict between the statute and the [appellate] rule[s . . .] in a purely procedural matter fixing a time limitation on appeals, the statutory provision must fall.” (alterations in original)) (quoting *McCormick v. Vigo County High Sch. Bldg. Corp.*, 226 N.E.2d 328, 331 (Ind. 1967)).

99. *Id.*

100. *NOW Courier, Inc. v. Review Bd. of the Ind. Dep’t of Workforce Dev.*, 871 N.E.2d 384 (Ind. Ct. App. 2007).

101. *Id.* at 389 n.3.

had filed with the Board a motion for correction of that record, “asserting that the record ‘filed’ was ‘incomplete’ because it failed to ‘contain any filings or orders issued by the Review Board in connection with [the] matter, including the Final Order’ appealed from.”¹⁰²

The Review Board responded that its notice of completion of the Clerk’s Record was complete.¹⁰³ It included the certified copy of the CCS pursuant to Appellate Rule 10(C)¹⁰⁴ and consisted of the “[CCS] and all papers, pleadings, documents, orders, judgments, and other materials filed in the . . . Administrative Agency,” according to Appellate Rule 2(E).¹⁰⁵ The Review Board contended that since the court of appeals had not ordered otherwise, the Review Board’s clerk was “retain[ing] [the Clerk’s Record] throughout the appeal”¹⁰⁶ under Appellate Rule 12(A).¹⁰⁷

Of importance to appellate practitioners is that the appellant had apparently confused the language of Indiana Code section 22-4-17-12(b), which outlines the requirement for the filing of a *transcript*,¹⁰⁸ with the requirements for the completion of *Clerk’s Record*.¹⁰⁹ The former requires that “rulings” and “documents and papers introduce into evidence or offered as evidence”¹¹⁰ be filed with the court, while the latter is complete if it includes the CCS.¹¹¹

The employer had filed a motion asking the court of appeals to order that the Clerk’s Record filed by the Review Board be corrected.¹¹² Rule 12(C) provides that “any party may copy any document from the Clerk’s Record,”¹¹³ and Rule 12(A) allows the clerk of the administrative agency to retain the record.¹¹⁴ The court of appeals cited these rules and concluded that the employer had been able to copy all the necessary material, as it was included in its appendix.¹¹⁵ As such, the court found the material properly before it and concluded that the employer’s motion was therefore moot.¹¹⁶

102. *Id.* The employer’s motion itemized various material not included with the notification of completion of the Clerk’s Record filed with the court of appeals. *Id.*

103. *Id.*

104. *Id.* (citing IND. APP. R. 10(C)).

105. *Id.* (citing IND. APP. R. 2(E)).

106. *Id.*

107. IND. APP. R. 12(A).

108. IND. CODE § 22-4-17-12(b) (2007).

109. *See NOW Courier*, 871 N.E.2d at 389 n.3.

110. IND. CODE § 22-4-17-12(b) (2007).

111. *NOW Courier*, 871 N.E.2d at 389 n.3.

112. *Id.*

113. IND. APP. R. 12(C).

114. IND. APP. R. 12(A) (noting that “the trial court clerk shall retain the Clerk’s Record throughout the appeal”).

115. *NOW Courier*, 871 N.E.2d at 389 n.3.

116. *Id.*

*C. A Brief Filed Thirty-Eight Days Late Is Untimely Enough
to Justify Dismissal*

The procedural backdrop to *Miller v. Hague Insurance Agency, Inc.*¹¹⁷ is as follows: On January 11, 2006, Farmers Mutual Insurance Company filed a motion for partial summary judgment against the Millers.¹¹⁸ On June 7, 2006, “[t]he trial court granted Farmers Mutual’s request for partial summary judgment,” and certified the “orders as final appealable judgments on June 7, 2006” at the request of the Millers.¹¹⁹ On that same day, the Millers filed their notice of appeal, and then they filed their Appellants’ Case Summary on June 22, 2006.¹²⁰ The notice of completion of Clerk’s Record and completion of the transcript were filed on June 23, 2006.¹²¹ The Millers did not file their brief by the July 24, 2006 deadline, and on July 31, 2006, the court of appeals indicated on the docket that the case would be transmitted for dismissal twenty days later.¹²² Apparently, “the Millers’ counsel . . . went on vacation from mid-June to July 5, 2006,” and while he was on vacation, his staff received notice that the trial record and transcript were complete.¹²³

“On August 29, 2006, the docket was transmitted for dismissal. On the same day, the Millers filed a verified motion to reinstate and for extension of time to file appellants’ brief.”¹²⁴ It was not until August 31, 2006, however, that the Millers filed their appellants’ brief and appendix with a motion for leave to file a belated brief and appendix.¹²⁵

On September 11, 2006, the court of appeals denied the Millers’ motion to reinstate as moot but granted their motion to file belated papers.¹²⁶ That same day, “Farmers Mutual filed an objection to the Millers’ motions.”¹²⁷ The court of appeals treated the objection as “a motion to reconsider and a motion for dismissal.”¹²⁸ A motions panel of the court of appeals denied the objection and “ordered the Millers to file an appendix in conformity with the [Rules].”¹²⁹

On appeal, the *Miller* court noted that a party is not precluded from appealing a ruling by the motions panel.¹³⁰ The court relied on Rule 45(B), which states that “[t]he appellant’s brief shall be filed no later than thirty (30) days after . . .

117. 871 N.E.2d 406 (Ind. Ct. App. 2007).

118. *Id.*

119. *Id.* at 406-07.

120. *Id.* at 407.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

the trial court clerk or Administrative Agency issues its notice of completion of the Transcript,”¹³¹ and Rule 45(D), which provides that “[t]he appellant’s failure to timely file the appellant’s brief may subject the appeal to summary dismissal.”¹³² After acknowledging that it is within an appellate court’s discretion to dismiss an appeal for the late filing of a brief,¹³³ the court, noted that “[a]lthough we will exercise our discretion to reach the merits when violations are comparatively minor, if the parties commit flagrant violations of the Rules of Appellate Procedure we will hold issues waived, or dismiss the appeal.”¹³⁴

Citing cases in which it had previously exercised its discretion to decide an appeal despite technical rule violations,¹³⁵ the court of appeals nevertheless dismissed the appeal, concluding that a brief filed thirty-eight days late was not a minor, excusable violation of Indiana’s appellate rules.¹³⁶ The appellant’s petition for rehearing was ultimately denied and transfer was not sought to the Indiana Supreme Court. As such, thirty-eight days will most likely be the benchmark for an untimely brief for quite some time.

Another important procedural point established by *Miller* was its rejection of the appellate attorney’s claims that the failure to file the brief timely was due to mistake or excusable neglect.¹³⁷ The attorney had argued that he had been unaware of the transcript’s completion “because the notice had arrived while he was on vacation.”¹³⁸ Simply stated, “[I]t is the duty of an attorney and his client to keep apprised of the status of matters before the court.”¹³⁹ *Miller* reminds practitioners that there are limits to the court of appeals’s kindness.

Miller can be contrasted with *Novatny v. Novatny*,¹⁴⁰ which involved the appeal of a trial court’s child custody modification order in favor of the father.¹⁴¹ The mother, appearing pro se, appealed the decision, arguing that the trial court

131. IND. APP. R. 45(B).

132. IND. APP. R. 45(D).

133. *Miller*, 871 N.E.2d at 407 (citing *Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95, 99 (Ind. Ct. App. 1995)).

134. *Id.* (citing *Terpstra v. Farmers & Merch. Bank*, 483 N.E.2d 749, 752 (Ind. Ct. App. 1985); *Town of Rome City v. King*, 450 N.E.2d 72, 76 (Ind. Ct. App. 1983)).

135. *See, e.g., Howell v. State*, 684 N.E.2d 576, 577 (Ind. Ct. App. 1997) (opting to take appeal when appellant’s brief was filed one day late); *Haimbaugh*, 653 N.E.2d at 99 (concluding that filing an appellant’s brief one day late was not flagrant violation of appellate rules); *Meyer v. N. Ind. Bank & Trust Co.*, 490 N.E.2d 400, 404 (Ind. Ct. App. 1986) (deciding to take appeal when appellant timely filed oversized brief, and court subsequently denied appellant’s motion to file oversized brief).

136. *Miller*, 871 N.E.2d at 408.

137. *Id.*

138. *Id.*

139. *Id.* (alteration in original) (quoting *Sanders v. Carson*, 645 N.E.2d 1141, 1144 (Ind. Ct. App. 1995)).

140. 872 N.E.2d 673 (Ind. Ct. App. 2007).

141. *Id.* at 676.

lacked jurisdiction under the Uniform Child Custody Act.¹⁴² The father cross-appealed, arguing for a dismissal of the appeal and asking for an award of appellate attorney fees.¹⁴³ The father's cross-appeal was based on the fact that the mother submitted to him her Appellant's Brief and Appendix, but neither document was actually filed, as they were returned to the mother by the clerk's office because of defects.¹⁴⁴ The mother later filed her Appellant's Brief, Appendix, and a Supplemental Authority, "[s]he did not, however, serve a copy of any of those documents on [the] [f]ather."¹⁴⁵

The court of appeals granted the father's "Motion to Compel Service of Appellant's Brief, Appendix and Supplemental Authority and for an Extension of Time to File Appellee's Brief."¹⁴⁶ Because the mother had still not provided the father with any of the relevant documents as ordered by the time he submitted his Appellee's Brief, he asked that "her appeal be dismissed and that he be awarded appellate attorney's fees."¹⁴⁷ After the father's request, the mother "submitted numerous documents and pleadings including a late Reply Brief," which, as put by the court of appeals, "did not respond to either issue raised by Father on cross-appeal."¹⁴⁸

In addressing the father's request for dismissal, the *Novatny* court reminded attorneys that a dismissal may be warranted where the appellant is in substantial noncompliance with the appellate rules, but acknowledged that the court would "prefer to resolve cases on the merits."¹⁴⁹ Moreover, the *Novatny* court observed that "[i]f an appellant inexcusably fails to comply with an appellate court order, then more stringent measures, including dismissal of the appeal, would be available as the needs of justice might dictate."¹⁵⁰ Nevertheless, the appellate court concluded that "[t]he needs of justice dictate that this case, which involves the modification of physical custody, be decided on its merits."¹⁵¹

The court of appeals highlighted the mother's noncompliance with the appellate rules by filing untimely papers, attempting "to alter the record on appeal, and present[ing] issues on appeal that were not before the trial court."¹⁵² Ultimately, the court clarified that its decision to review the case on the merits was not impacted by the mother appearing *pro se*, as "[i]t is well settled that *pro*

142. *Id.*

143. *Id.* at 676-77.

144. *Id.*

145. *Id.* at 676.

146. *Id.* at 676-77.

147. *Id.* at 677.

148. *Id.* (explaining that the father's Appellee's Brief apparently responded to the brief submitted to the father on March 29, but which was not actually filed).

149. *Id.* (citing *Hughes v. King*, 808 N.E.2d 146, 147 (Ind. Ct. App. 2004)).

150. *Id.* (quoting *Johnson v. State*, 756 N.E.2d 965, 967 (Ind. 2001)).

151. *Id.* (referring to the mother's claim that the court had no jurisdiction under the Uniform Child Custody Jurisdiction Act because she, the children, and the father had all moved from Indiana).

152. *Id.*

se litigants are held to the same standard as licensed lawyers.”¹⁵³ In the end, the court concluded that the mother’s noncompliance could be dealt with by ignoring her inappropriate requests, pointing out that the father was able to “discern and address” the issues that were raised by the mother in the face of her noncompliance.¹⁵⁴

D. Cases Deciding What Warrants an Award of Appellate Attorney’s Fees

During the last period, the court of appeals addressed several requests for appellate attorneys’ fees. Appellate Rule 66(E) provides that a court “may assess damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court’s discretion and may include attorneys’ fees.”¹⁵⁵ The opinions from this reporting period confirm that such recoveries are rare and will only be awarded in unusual circumstances.

The court of appeals opinion in *In re Estate of Carnes*¹⁵⁶ reiterated the framework for when an appeal meets the standard for the award of appellate attorney fees:

Indiana appellate courts have formally categorized claims for appellate attorney fees into “substantive” and “procedural” bad faith claims. To prevail on a substantive bad faith claim, the party must show that the appellant’s contentions and arguments are utterly devoid of all plausibility. Procedural bad faith, on the other hand, occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. Even if the appellant’s conduct falls short of that which is “deliberate or by design,” procedural bad faith can still be found.¹⁵⁷

In *Carnes*, the court found both procedural and substantive bad faith and therefore granted Rule 66(E) attorney’s fees.¹⁵⁸ The procedural bad faith came by way of briefing. The *Carnes* court pointed out that (i) “Carnes’s statement of the issues [was just] a list of the trial court’s findings that he [was] contesting and [did] not ‘concisely and particularly describe each issue presented for review;’”¹⁵⁹ (ii) his statement of the case was merely “a recitation of his contentions” and not a description of “the nature of the case, the course of the proceedings relevant to the issue presented for review, and the disposition of

153. *Id.* at 677 n.3 (citing *Payday Today, Inc. v. McCullough*, 841 N.E.2d 638, 644 (Ind. Ct. App. 2006)).

154. *Id.* at 679.

155. IND. APP. R. 66(E).

156. 866 N.E.2d 260 (Ind. Ct. App. 2007).

157. *Id.* at 267 (quoting *Potter v. Houston*, 847 N.E.2d 241, 249 (Ind. Ct. App. 2006)).

158. *Id.* at 267-69.

159. *Id.* at 267 (quoting IND. APP. R. 46(A)(4)).

these issues by the trial court;”¹⁶⁰ and (iii) his statement of the facts, although in narrative form, was essentially a list of accusations.¹⁶¹

The court first noted that appellate courts “must use extreme restraint” when using their discretionary power to award appellate attorney’s fees “because of the potential chilling effect upon the exercise of the right to appeal.”¹⁶² The court also explained that for a Rule 66(E) attorney fee award, “[a] strong showing is required . . . and the sanction is not imposed to punish mere lack of merit, but something more egregious.”¹⁶³ In finding procedural bad faith for flagrant disregard of the form and content requirements of the appellate rules, the court thought “Carnes’s arguments on appeal constitute[d] an incoherent and illogical tirade of accusations, repeated in every section of his brief, and which are completely unsubstantiated by the record.”¹⁶⁴

On the substantive side, Carnes’s appendix did not contain “crucial documents regarding the previous disposition” made by an Arizona trial court as to issues on appeal, but rather he cited his own petition filed in an Indiana trial court to support his contention that a “will contest [was] still pending in the Arizona courts.”¹⁶⁵ He also neglected to supply the court with a copy of the disposition from the Arizona court in violation of Appellate Rule 50(A)(2)(b).¹⁶⁶

The Estate, however, provided the court of appeals with a copy of an Arizona order, which had concluded that Carnes’s father’s will, which excluded Carnes, was valid.¹⁶⁷ Carnes, however, seemingly ignored that order by arguing in his brief that his chances of inheriting from his father’s estate “get better and better.”¹⁶⁸ Based on the Arizona rulings and the fact that Carnes failed to supply the court of appeals with evidence that the appeal was still pending, the court found it difficult to understand how Carnes could have believed that the will contest was still pending.¹⁶⁹ Instead, the court thought that Carnes was “being less than candid with this court” and was ignoring the Arizona precedent in an

160. *Id.* (quoting IND. APP. R. 46(A)(5)).

161. *Id.* at 267-68 (Carnes’s statement of the facts was “woefully lacking and [did] not provide [the] court with any factual basis upon which to review the merits of his claims.”).

162. *Id.* (citing *Manous v. Manousogianakis*, 824 N.E.2d 756, 767 (Ind. Ct. App. 2005)); *see also* *Novatny v. Novatny*, 872 N.E.2d 673, 682 (Ind. Ct. App. 2007) (“We temper our determination to allow appellate attorney’s fees ‘so as not to discourage innovation or periodic reevaluation of controlling precedent.’” (quoting *Potter*, 847 N.E.2d at 249)).

163. *Carnes*, 866 N.E.2d at 268 (citing *Manous*, 824 N.E.2d at 767-68).

164. *Id.*

165. *Id.*

166. *Id.* (citing IND. APP. R. 50(A)(2)(b), which provides that the Appellant’s Appendix shall contain “the appealed judgment or order, including any written opinion, memorandum of decision, or findings of fact and conclusions thereon relating to the issues raised on appeal”).

167. *Id.* (Carnes also ignored an Arizona court order, which concluded that Carnes’s sister’s power of attorney for her father while he was living was valid. A subsequent appeal of that order was dismissed as moot upon the death of the father.).

168. *Id.*

169. *Id.*

attempt to re-litigate his claims.¹⁷⁰ Carnes “steadfastly ignored unfavorable factual determinations and rulings,” and his litigation was found by the court of appeals to be merely for the purpose of delaying the probate of his father’s will and to harass his sister.¹⁷¹ Accordingly, the court remanded the case to determine the amount of appellate attorney’s fees to award to the estate.¹⁷²

The court of appeals issued another ruling on appellate fees in *Smith v. Lake County*.¹⁷³ Smith, a bail bondsman, had brought an action against Lake County and the county’s superior court clerk, challenging the constitutionality of Indiana’s bail scheme.¹⁷⁴ The court of appeals observed that another panel of the court had already affirmed summary judgment against Smith on claims that he raised against Hammond officials regarding several provisions of Indiana’s bail scheme.¹⁷⁵ The court of appeals concluded that

[t]here can be little doubt that Smith and his counsel are attempting to inflict the litigatory equivalent of death by a thousand cuts on the government officials and taxpayers of Lake County by mounting piecemeal challenges to the legislative scheme that allows criminal defendants to post a ten percent cash bond in lieu of patronizing Smith’s bail bond establishment.¹⁷⁶

The court of appeals determined that Lake County had incorrectly sought sanctions under Indiana Code section 34-13-3-21 because that statute provides for attorney’s fees in a tort action against a governmental entity and was therefore inapplicable to the matter before it.¹⁷⁷ Still, the court, *sua sponte*, turned to Appellate Rule 66(E) and observed that it had previously stated that “damages should be assessed under this rule when an appeal is replete with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.”¹⁷⁸ Furthermore, the court stated that it “must use extreme restraint when exercising [its] discretionary power to award damages on appeal because of the potential chilling effect upon the exercise of the right to appeal.”¹⁷⁹

170. *Id.* at 268-69.

171. *Id.* at 269 (quoting *Potter*, 847 N.E.2d at 249).

172. *Id.* at 268.

173. 863 N.E.2d 464 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 209 (Ind. 2007).

174. *Id.* at 466, 471 n.8.

175. *Id.* at 471 (citing *Smith v. City of Hammond*, 848 N.E.2d 333, 336 (Ind. Ct. App. 2006) (“Smith III”), which in turn refers to the Seventh Circuit’s warning to Smith in *Smith v. City of Hammond*, 388 F.3d 304, 308 (7th Cir. 2004) (“Smith IV”), that “[i]f Smith persists in this hopeless litigation—he and his lawyer—are courting sanctions”).

176. *Id.* at 472.

177. *Id.*

178. *Id.* (quoting *Montgomery v. Trisler*, 814 N.E.2d 682, 685 (Ind. Ct. App. 2004)); *but see* *Stillwell v. Deer Park Mgmt.*, 873 N.E.2d 647, 652 (Ind. Ct. App. 2007) (concluding that appellate attorney fees were not appropriate as the “appeal was not meritless, as proven by his claim that Deer Park should have been represented by counsel throughout its pursuit of the small claims action”).

179. *Smith*, 863 N.E.2d at 472-73 (quoting *Trost-Steffen v. Steffen*, 772 N.E.2d 500, 514 (Ind.

In deciding that Rule 66(E) appellate attorney fees were appropriate in *Smith*, the court stated,

When viewed in isolation, perhaps Smith's appeal from his unsuccessful attempt to relitigate the enforcement of Indiana Code section 35-33-8.5-4 would not be considered sufficiently egregious to merit an award of damages pursuant to Appellate Rule 66(E). When viewed in the context of Smith's well-documented history of piecemeal attacks on Indiana's bail scheme, however, the instant appeal may fairly be characterized as harassing and vexatious.¹⁸⁰

The court of appeals ultimately remanded the case for a calculation of damages including appellate attorney fees under Rule 66(E).¹⁸¹

The court of appeals decided yet another appellate fee issue in *Inland Steel Co. v. Pavlinac*.¹⁸² A single hearing member of the Workers' Compensation Board ("Board") had concluded that a claimant with repetitive back trauma was permanently and totally disabled due to cumulative work-related injuries.¹⁸³ He was therefore entitled to workers' compensation benefits.¹⁸⁴ The court of appeals increased the Board's award to the claimant by ten percent pursuant to Indiana Code section 22-3-4-8(f), which provides that "[a]n award of the full board affirmed on appeal, by the employer, shall be increased thereby five percent (5%), and by order of the court may be increased ten percent (10%)."¹⁸⁵ The court noted that generally an order to increase the award by ten percent is only warranted when (i) the issues presented on appeal are frivolous, (ii) appellate review is thwarted by the actions of the employer, or (iii) the worker has been prevented from obtaining workers' compensation for an extended period of time.¹⁸⁶ The court of appeals increased the award by ten percent in part on the employer presenting issues, which "sought to have [the] court go against [its] standard of review or ultimately proved to be disingenuous or trivial."¹⁸⁷

Interestingly, the court of appeals noted that despite the "patent disingenuity"¹⁸⁸ on record in the case, which warranted a ten percent increase

Ct. App. 2002)).

180. *Id.* at 473.

181. *Id.*

182. 865 N.E.2d 690 (Ind. Ct. App. 2007); *see also* *Nationwide Ins. Co. v. Heck*, 873 N.E.2d 190, 197 n.3 (Ind. Ct. App. 2007) ("We deny Larry's request for appellate attorney's fees under Indiana Appellate Rule 66(E). While Nationwide's initial brief and appendix were deficient in numerous ways, those deficiencies do not warrant sanction, and Nationwide has filed a supplemental appendix.").

183. *Inland Steel*, 865 N.E.2d at 696.

184. *Id.*

185. *Id.* at 703-04 (alteration in original) (quoting IND. CODE § 22-3-4-8(f) (LexisNexis 1997)).

186. *Id.* at 703.

187. *Id.* at 704.

188. *Id.* (quoting *Graycor Indus. v. Metz*, 806 N.E.2d 791, 802 (Ind. Ct. App. 2004), in

in the board's award, "there [was] no allegation that [the employer] deliberately presented such issues so as to delay [the employee's] receipt of worker's compensation benefits."¹⁸⁹ Nor did it appear to the court of appeals "that [the employer's] brief upon appeal was written in a manner calculated to require the maximum expenditure of time by both [the employee] and this court."¹⁹⁰

The *Inland Steel* court also observed that generally "attorney fees are awarded where procedural or substantive bad faith is shown" and that procedural bad faith "stems from flagrant violations of appellate procedure; substantive bad faith is found where appellate arguments are utterly devoid of all plausibility."¹⁹¹ The appellate court eventually concluded that although "we have found it appropriate to order the Board's award to be increased by ten percent, we do not think Inland's actions upon appeal were so egregious or deliberate so as to warrant an additional award of damages, including attorney fees, pursuant to Appellate Rule 66."¹⁹² In the end, the decision in *Inland Steel* is unique in that it discusses and applies a statutory penalty in the framework of language discussing the award of Rule 66(E) appellate attorney fees.¹⁹³

support of the court's determination that a ten percent increase in the award of the full board affirmed on appeal was warranted in this case).

189. *Id.*

190. *Id.* (citing *Gabriel v. Windsor, Inc.*, 843 N.E.2d 29, 49-50 (Ind. Ct. App. 2006)).

191. *Id.* (citing *Metz*, 806 N.E.2d at 801).

192. *Id.*; see also *Metz*, 806 N.E.2d at 801 (noting that appellate court discretion to award attorney fees under Rule 66(E) is limited to situations when the appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay").

193. Another case decided during this period briefly touched on the award of appellate attorney fees under Appellate Rule 67 in which the court of appeals affirmed summary judgment to a bank and concluded that the bank was entitled to the termination fee according to the terms of a lease between it and appellant. See *O'Brien v. 1st Source Bank*, 868 N.E.2d 903, 909 (Ind. Ct. App. 2007). Rule 67 provides in part:

(A) Upon a motion by any party within sixty (60) days after the final decision of the Court of Appeals or Supreme Court, the Clerk shall tax costs under this Rule.

(B) Costs shall include:

(1) the filing fee, including any fee paid to seek transfer or review;

(2) the cost of preparing the Record on Appeal; including the Transcript, and appendices; and

(3) postage expenses for service of all documents filed with the Clerk.

The Court, in its discretion, may include additional items permitted by law. Each party shall bear the costs of preparing its own briefs.

IND. APP. R. 67(A)-(b). The *O'Brien* court concluded that to the extent the bank sought litigation costs not contemplated by the rule, it could seek expenses pursuant to a contract provision, but found that the bank had submitted no evidence of the amount of attorney fees and litigation costs it incurred. *O'Brien*, 868 N.E.2d at 909-10. The court remanded the issue to the trial court for the determination of a reasonable amount of appellate attorney fees and litigation costs.

E. Out of Cite, Not out of Mind

During this reporting period, *Edwards v. State*¹⁹⁴ clarified an important distinction concerning unpublished opinions, which is stated in the rules but may be overlooked by appellate practitioners. Edwards had appealed numerous convictions, and after the trial court vacated two conspiracy to commit murder counts, Edwards was left with a 140-year prison sentence.¹⁹⁵ Arguing that the trial court had abused its discretion by admitting a taped conversation between a prosecuting witness and a police officer, Edwards contended that the issue had already been decided in his favor.¹⁹⁶ The court of appeals observed that its previous opinion¹⁹⁷ was unpublished and that under Appellate Rule 65(D), “unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case.”¹⁹⁸

The court of appeals stated that while a former adjudication will be conclusive in a subsequent action, even if the two actions are on different claims, it will only be so as to the issues that were actually litigated and decided, and not those only inferred by argument.¹⁹⁹ *Edwards* then set forth the two-part test for applying collateral estoppel: “(1) whether the party in the prior action had a full and fair opportunity to litigate the issue, and (2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case.”²⁰⁰

Edwards concluded that both Edwards and the State were parties to the prior action and had fully and fairly litigated the issue.²⁰¹ Furthermore, “it would not be unfair to apply collateral estoppel to the facts of [the current] case,” as the law regarding forfeiture by wrongdoing applied in its unpublished opinion had not changed and so guaranteed the same result if revisited.²⁰² Ultimately, the court of appeals concluded that the trial court’s admission of the taped conversation was harmless error; it was cumulative of other evidence and did not affect the jury’s decision.²⁰³

In keeping with the publishing theme, the court of appeals addressed motions

194. 862 N.E.2d 1254 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 457 (Ind. 2007).

195. *Id.* at 1258-59.

196. *Id.* at 1259.

197. *Edwards v. State*, 855 N.E.2d 1079 (Ind. Ct. App. 2006) (unpublished table decision).

198. *Edwards*, 862 N.E.2d at 1259 (citing IND. APP. R. 65(D)). Another case decided during this reporting period also reminded appellate counsel of this rule. See *Ashbaugh v. Horvath*, 859 N.E.2d 1260, 1268 n.8 (Ind. Ct. App. 2007).

199. *Id.*

200. *Id.* (quoting *Afolabi v. Atlantic Mortgage & Inv. Corp.*, 849 N.E.2d 1170, 1175-76 (Ind. Ct. App. 2006)).

201. *Id.* at 1260.

202. *Id.*

203. *Id.*

to publish in *M.S. ex rel. Newman v. K.R.*²⁰⁴ In that case, a party had filed a motion to publish a memorandum decision, arguing that the decision was worthy of precedential value.²⁰⁵ The party contended that her motion was timely because she had filed it within thirty days of the supreme court's order denying transfer.²⁰⁶ The court of appeals disagreed and denied the motion, ruling that motions to publish must be filed within thirty days of the "handdown" date.²⁰⁷ The court reasoned, "[S]o that our Supreme Court is aware whether the underlying decision is for publication or not for publication when it rules on a party's petition for transfer."²⁰⁸

F. "Decorum" in the Appellate Rules

In *Steve Silveus Insurance, Inc. v. Goshert*,²⁰⁹ the court of appeals addressed Indiana appellate attorney decorum (or lack thereof). The court began by reminding attorneys that appellate judges ask for "two basic things from appellate practitioners in this state: compliance with the Indiana Rules of Appellate Procedure and adherence to fundamental standards of professionalism."²¹⁰ The court of appeals then concluded that the insurance company's counsel failed to comply with at least two rules of appellate procedure, namely Rules 50(A)(2) and 51(C).²¹¹

The attorney had included the entire approximate 1500-page transcript in the Appellants' Appendix, which as the court put it, "[a]side from being a waste of paper and unnecessarily bloating the record on appeal, . . . violates Indiana Rule of Appellate Procedure 50(A)(2)."²¹² The court also reminded practitioners that "[s]ubsection (d) compels inclusion of *the portion* of the Transcript that contains the rationale of the decision and any colloquy related thereto, if and to the extent the brief challenges any oral ruling or statement of decision."²¹³ Additionally subsection (g) contemplates including only "*brief portions* of the Transcript . . . that are important to a consideration of the issues raised on appeal[.]"²¹⁴ Accordingly, the court referenced the actual transcript pagination, as opposed to the transcript pagination in the Appellants' Appendix.²¹⁵

204. 871 N.E.2d 303 (Ind. Ct. App. 2007).

205. *Id.* at 306 n.1.

206. *Id.*

207. *Id.*

208. *Id.* (citing IND. APP. R. 65(B) ("Within thirty (30) days of the entry of the decision, a party may move the Court to publish any not-for-publication memorandum decision which meets the criteria for publication.")).

209. 873 N.E.2d 165 (Ind. Ct. App. 2007).

210. *Id.* at 172.

211. *Id.*

212. *Id.*

213. *Id.* (quoting IND. APP. R. 50(A)(2)).

214. *Id.* (omission and alteration in original) (quoting IND. APP. R. 50(A)(2)).

215. *Id.*

Next, the *Silveus* court discussed appellate counsel's failure to comply with Rule 51(C), "which provides, 'All pages of the Appendix shall be numbered at the bottom consecutively, without obscuring the Transcript page numbers, regardless of the number of volumes the Appendix requires.'"²¹⁶ Citing appellate counsel's "attempt to make it easier to locate and identify items," the court of appeals disapproved of counsel's more complicated numbering scheme and found the system "unnecessarily confusing."²¹⁷

The court of appeals also focused on "the tenor" of appellate counsel's brief.²¹⁸ For example, one of the briefs described the opposing parties as "thieves and liars."²¹⁹ Another passage contended, "[t]he same lack of conscience, arrogance, and ingratitude that led to Goshert stealing *Silveus*' trade secrets and business, underlies Goshert's warped view that *Silveus* did not own anything and did not have any secrets so Goshert should be free to rip them all off for themselves."²²⁰ Counsel also described opposing counsel's argument as "an insult to the English language."²²¹ The court of appeals admonished that "[s]uch vitriol is inappropriate and not appreciated by this court, nor does it constitute effective appellate advocacy."²²²

III. REFINING OUR APPELLATE PRACTICE

A. *Don't Forget the "Script"*²²³

In *Fields v. Conforti*²²⁴ the court of appeals addressed issues surrounding the transcript. The appellants had not submitted a transcript of the bench trial upon

216. *Id.* (quoting IND. APP. R. 51(C)).

217. *Id.* The court of appeals explains that the Appellant's Appendix was numbered from page 1 through page 27, then from page 1 (of the transcript) through page 1515 (of the transcript), then from page "27A-1" through page "27A-92," and finally from page 28 through page 970. As a result, there are, for example, two pages marked "45," two pages marked "139," two pages marked "802," etc. If counsel had simply assembled his 2587-page appendix in accordance with Rule 51(C), it would have been numbered consecutively from page 1 through 2587.

Id.

218. *Id.*

219. *Id.* (citing Appellants' Br. at 45).

220. *Id.* at 172-73 (citing Appellants' Reply Br. at 9).

221. *Id.* at 173 (citing Appellants' Reply Br. at 11).

222. *Id.* (quoting *Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157, 162 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 590 (Ind. 2006)).

223. IND. APP. R. 9(F)(4) provides as follows:

The Notice of Appeal shall designate all portions of the Transcript necessary to present fairly and decide the issues on appeal. If the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence.

224. 868 N.E.2d 507 (Ind. Ct. App. 2007).

which the trial court's findings of fact and conclusions were based.²²⁵ Relying on two Indiana Supreme Court cases²²⁶ which had approved of this omission,²²⁷ the appellants similarly argued that the transcript was unnecessary because they were not contending that the trial court's findings of fact were unsupported by the evidence.²²⁸ The court of appeals attempted to address the issues raised by the appellants without a copy of the transcript.²²⁹ The court began by noting Appellate Rule 49(B),²³⁰ "which provides that the failure to include an item in an appendix shall not waive any issue or argument,"²³¹ and Appellate Rule 9(G),²³² "which allows supplemental requests for transcripts to be filed."²³³ The *Fields* court ultimately made clear that without a transcript any arguments that depend upon the evidence presented at the bench trial will be waived.²³⁴

B. Uncited Authority

In *Keeney v. State*²³⁵ the court of appeals admonished defense counsel, whose brief contained uncited material in violation of Rule 46(A)(8)(a).²³⁶ Early in *Keeney*, the court noted that "Keeney's brief . . . ignores relevant Indiana case law on" the constitutionality of Indiana Code section 10-13-6-10, which requires a convict to provide a DNA sample to the state in light of United States Supreme Court precedent.²³⁷ The court then complained that Keeney's appellate counsel had "filled her brief with uncited material," such that "the brief's entire 'Argument' section is a near-verbatim replication of a recent Memorandum and Order from the United States District Court for the District of Massachusetts."²³⁸ Citing 46(A)(8)(a), which provides that "[e]ach contention in an appellate brief 'must be supported by citations to authorities . . . relied on,'"²³⁹ the court of appeals observed that "Keeney's attorney has not cited [the Massachusetts order],

225. *Id.* at 510.

226. *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004); *Walker v. West*, 665 N.E.2d 586, 588 (Ind. 1996).

227. *Pabey*, 816 N.E.2d at 1141-42; *Walker*, 665 N.E.2d at 588.

228. *Fields*, 868 N.E.2d at 510-11.

229. *Id.* at 511.

230. IND. APP. R. 49(B).

231. *Fields*, 868 N.E.2d at 510.

232. IND. APP. R. 9(G).

233. *Fields*, 868 N.E.2d at 510. Both of these rules were relied upon in *Pabey*, 816 N.E.2d 1138 (Ind. 2004).

234. *Id.* ("[F]ailure to include a transcript works a waiver of any specifications of error which depend upon the evidence." (quoting *Walker v. West*, 665 N.E.2d 586, 588 (Ind. 1996))).

235. 873 N.E.2d 187 (Ind. Ct. App. 2007).

236. *Id.* at 189.

237. *Id.* at 188.

238. *Id.* at 189 (footnote omitted).

239. *Id.* (citing IND. APP. R. 46(A)(8)(a)).

nor has she otherwise indicated to this court that she is relying on that case.”²⁴⁰

Specifically, the appellate attorney had (i) changed the defendant’s name in the case she relied upon to her client’s name, (ii) changed the case’s “reference to the United States government to the State,” (iii) “omitted a sentence on the federal DNA Act,” (iv) dropped paragraphs from the case down into her brief’s footnotes, and (v) “moved one paragraph up in the text.”²⁴¹ “Other than those changes, . . . the two documents [were] identical, including the District Court’s reference to there being no decisions from the Court of Appeals for the First Circuit ‘directly on point.’”²⁴² The *Keeney* court noted that the Indiana Supreme Court had previously addressed this issue stating:

To place all this conglomeration of uncited material in a Brief is an imposition on the Court. We do not mean to say that such material should not be used if properly identified. However, as we have said, “the great rule in drawing briefs consists in conciseness with perspicuity.” A brief is not to be a document thrown together without either organized thought or intelligent editing on the part of the brief-writer. Inadequate briefing is not, as any thoughtful lawyer knows, helpful to either a lawyer’s client or to the Court. We make this point so that when the compensation for Appellant[’s] attorney is fixed some consideration may be given to the way in which the Brief in this case was prepared.²⁴³

This point was echoed by the *Keeney* court’s observation that simply regurgitating authority without citation contributed to Keeney’s failure to advance any “‘argument . . . supported by cogent reasoning’” as required by Rule 46(A)(8)(a).²⁴⁴ The appellate court reminded appellate practitioners of the importance of proper attribution, but more importantly cautioned attorneys of the court’s authority to penalize an attorney for “merely transplant[ing] the District Court’s order into her brief as if it were her own work.”²⁴⁵ Although the *Keeney* court only admonished appellate counsel the court did state that it could have (i) required Keeney’s attorney to not collect a fee for her services and to return any already received fee to the payor with interest, (ii) stricken the brief entirely, (iii) referred the matter to the supreme court disciplinary commission for investigation of any violation of Indiana Professional Conduct Rule 1.1,²⁴⁶ or (iv) ordered Keeney’s attorney to show cause why she should not be held in contempt.²⁴⁷

240. *Id.*

241. *Id.* at 189 n.1.

242. *Id.* (citing *United States v. Stewart*, 468 F. Supp. 2d 261, 268 (D. Mass. 2007)).

243. *Id.* at 189-90 (quoting *Frith v. State*, 325 N.E.2d 186, 188-89 (1975) (citation omitted)).

244. *Id.* at 190 (omission in original) (quoting IND. APP. R. 46(A)(8)(a)).

245. *Id.*

246. This Rule requires attorneys to represent their clients competently. IND. PROF’L CONDUCT R. 1.1.

247. *Keeney*, 873 N.E.2d at 190.

C. Other Briefing Issues

During this reporting period, the appellate courts documented other problems with briefing such as (i) failure to include the order being appealed;²⁴⁸ (ii) lack of cogent argument;²⁴⁹ (iii) improper margins;²⁵⁰ (iv) failure to present proper statement of the issues,²⁵¹ statement of facts,²⁵² statement of the case,²⁵³ and standard of review;²⁵⁴ (v) improper filing of documents excluded from public access;²⁵⁵ (vi) failure to cite facts in the record;²⁵⁶ (vii) failure to include the challenged jury instruction in the argument section;²⁵⁷ (viii) failure to file an

248. *Armstrong v. Keene*, 861 N.E.2d 1198, 1200 n.1 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007); *Shuger v. State*, 859 N.E.2d 1226, 1230 n.1 (Ind. Ct. App. 2007); *Bambi's Roofing, Inc. v. Moriarty*, 859 N.E.2d 347, 350 n.1 (Ind. Ct. App. 2006); *House v. First Am. Title Co.*, 858 N.E.2d 640, 642 n.1 (Ind. Ct. App. 2006); *Knowledge A-Z, Inc. v. Sentry Ins.*, 857 N.E.2d 411, 414 n.1 (Ind. Ct. App. 2006). All cases cite to IND. APP. R. 46(A)(10).

249. *In re Estate of Carnes*, 866 N.E.2d 260, 265-66 (Ind. Ct. App. 2007); *Carr v. Pearman*, 860 N.E.2d 863, 866 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007); *Leone v. Keesling*, 858 N.E.2d 1009, 1014 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 456 (Ind. 2007). All cases cite to IND. APP. R. 46(A)(8).

250. *Tompa v. Tompa*, 867 N.E.2d 158, 161 n.1 (Ind. Ct. App. 2007) (citing IND. APP. R. 43(G)).

251. *State Farm Mut. Auto. Ins. Co. v. Cox*, 873 N.E.2d 124, 125 n.1 (Ind. Ct. App. 2007); *Carnes*, 866 N.E.2d at 265-66; *Nolan v. Taylor*, 864 N.E.2d 419, 420 n.1 (Ind. Ct. App. 2007). All cases cite to IND. APP. R. 46(A)(4).

252. *In re Kay L.*, 867 N.E.2d 236, 238 n.1 (Ind. Ct. App. 2007); *Carnes*, 866 N.E.2d at 265-66; *First Nat'l Bank & Trust v. Indianapolis Pub. Hous. Agency*, 864 N.E.2d 340, 342 n.1 (Ind. Ct. App. 2007); *Stumpf v. Hagerman Constr. Corp.*, 863 N.E.2d 871, 877 n.3 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007); *Perez v. Bakel*, 862 N.E.2d 289, 291 n.1 (Ind. Ct. App. 2007); *Armstrong*, 861 N.E.2d at 1200 n.1; *Espinoza v. State*, 859 N.E.2d 375, 379 n.2 (Ind. Ct. App. 2006); *Keesling v. Winstead*, 858 N.E.2d 996, 997 n.1 (Ind. Ct. App. 2006). All cases cite to IND. APP. R. 46(A)(6).

253. *Nolan*, 864 N.E.2d at 420 n.2.; *Lightcap v. State*, 863 N.E.2d 907, 909 n.1 (Ind. Ct. App. 2007).

254. *Tucker v. Duke*, 873 N.E.2d 664, 668 n.6 (Ind. Ct. App. 2007); *Estate of Dyer v. Doyle*, 870 N.E.2d 573, 582-83 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 221 (Ind. 2007); *Carnes*, 866 N.E.2d at 265-66; *Marks v. State*, 864 N.E.2d 408, 409 n.1 (Ind. Ct. App. 2007); *Hodges v. Swafford*, 863 N.E.2d 881, 885 n.6 (Ind. Ct. App.), *amended on reh'g*, 868 N.E.2d 1179 (Ind. Ct. App. 2007); *Armstrong*, 861 N.E.2d at 1200 n.1; *Carr*, 860 N.E.2d at 867 n.2.; *Leone*, 858 N.E.2d at 1014. All cases cite to IND. APP. R. 46(A)(8)(b).

255. *Bumbalough v. State*, 873 N.E.2d 1099, 1100 n.1 (Ind. Ct. App. 2007); *Espinoza*, 859 N.E.2d at 379 n.2.

256. *Carnes*, 866 N.E.2d at 265-66; *Lang v. Starke County Office of Family & Children*, 861 N.E.2d 366, 374 n.4 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 456 (Ind. 2007).

257. *Dyer*, 870 N.E.2d at 582; *Snell v. State*, 866 N.E.2d 392, 395 n.1 (Ind. Ct. App. 2007).

appendix,²⁵⁸ including necessary documents in the appendix,²⁵⁹ or other appendix problems;²⁶⁰ and (ix) generally defective briefing.²⁶¹

D. In Other News

1. *Interesting Orders*.—The court of appeals in *Thomison v. IK Indy, Inc.*²⁶² applied Rule 42, which provides that the court “‘may order stricken from any document any redundant, immaterial, impertinent, scandalous or other inappropriate matter.’”²⁶³ The court used the rule to strike portions of an appellant’s brief that requested relief for another party because the other party had not filed a timely notice of appeal under Rule 9(A)(5)²⁶⁴ or a joint notice of appeal under Rule 9(C)²⁶⁵ and had consequently forfeited his right to appeal.²⁶⁶

In *Challenge Realty, Inc. v. Leisentritt*,²⁶⁷ the court of appeals issued an order upholding the timing requirements of the Rules.²⁶⁸ Four days before that order, the court of appeals had entered an order allowing the appellant’s counsel to withdraw but that the appellant’s brief remain due on the scheduled

258. *Nolan*, 864 N.E.2d at 421 n.8.

259. *Adams v. Adams*, 873 N.E.2d 1094, 1096 (Ind. Ct. App. 2007); *Wolfe v. Estate of Custer*, 867 N.E.2d 589, 597 n.8 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007); *Carnes*, 866 N.E.2d at 265, 268; *Niemeyer v. State*, 865 N.E.2d 674, 676 (Ind. Ct. App. 2007); *Shuger v. State*, 859 N.E.2d 1226, 1230 n.1 (Ind. Ct. App. 2007).

260. *Tamko Roofing Prods., Inc. v. Dilloway*, 865 N.E.2d 1074, 1079 n.1 (Ind. Ct. App. 2007) (no page numbers in appendix); *City of Crown Point v. Misty Woods Props., LLC*, 864 N.E.2d 1069, 1074 n.2 (Ind. Ct. App. 2007) (appellee included material already in appellant’s appendix); *Perez v. Bakel*, 862 N.E.2d 289, 295 (Ind. Ct. App. 2007) (failure to include table of contents in appendix); *Finke v. N. Ind. Pub. Serv. Co.*, 862 N.E.2d 266, 273 n.5 (Ind. Ct. App. 2006) (failure to cite to motion included in appendix), *trans. denied*, 869 N.E.2d 458 (Ind. 2007); *McGuire v. Century Sur. Co.*, 861 N.E.2d 357, 359 n.1 (Ind. Ct. App. 2007) (noting several deficiencies including: (1) failure to paginate; (2) failure to include pleadings; (3) failure to include summary judgment; and (4) failure to include designated evidence); *Shuger*, 859 N.E.2d at 1230 n.1 (failure to include CCS); *Estate of Owen v. Lyke*, 855 N.E.2d 603, 607 n.2 (Ind. Ct. App. 2006) (failure to consecutively number pages in appendix).

261. *Carnes*, 866 N.E.2d at 265-67; *Armstrong v. Keene*, 861 N.E.2d 1198, 1200 n.1 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007); *Bambi’s Roofing, Inc. v. Moriarty*, 859 N.E.2d 347, 352 (Ind. Ct. App. 2006).

262. 858 N.E.2d 1052 (Ind. Ct. App. 2006).

263. *Id.* at 1053 n.1 (quoting IND. APP. R. 42).

264. IND. APP. R. 9(A)(5) (“Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited . . .”).

265. IND. APP. R. 9(C) (“If two (2) or more persons are entitled to appeal from a single judgment or order, they may proceed jointly by filing a joint Notice of Appeal. The joined parties may, thereafter, proceed on appeal as a single appellant.”).

266. *Thomison*, 858 N.E.2d at 1053 n.1.

267. 867 N.E.2d 711 (Ind. Ct. App. 2007).

268. *Id.* at 711-12.

deadline—eleven days after the first order.²⁶⁹ On the date of the first order, the appellees had filed their Limited Objection Regarding Motion to Withdraw Appearance, noting that the appellant had obtained three previous extensions of time to file its opening brief.²⁷⁰ The appellees also alleged that further delay in the briefing schedule would prejudice their efforts to obtain a prompt resolution of the appeal.²⁷¹

Explaining that they had already set aside a significant amount of time to prepare a response brief, the appellees requested that the original court order, with regard to the withdrawal of appellant's counsel, explicitly state that the appellant's brief remain due on the date already established "*and that no further extensions . . . be granted.*"²⁷² The court of appeals agreed that significant financial and temporal strains had been placed upon the appellees by the requests for extensions of time.²⁷³ The court also recognized the under the Rules the appellant's opening brief "'shall be filed no later than thirty (30) days after . . . the date the trial court clerk . . . issues its notice of completion of the transcript.'"²⁷⁴ The court therefore modified its order that the brief remain due on a certain date to also state that the appellant "shall not request or be granted any additional extensions of time" regardless of whether he retains new counsel.²⁷⁵

2. *At a Glance.*—Over this past year, "the [Indiana Supreme] Court's civil transfer docket grew over the proceeding [sic] year, both in total amount and as a percentage of total transfer cases."²⁷⁶ Up from last year's 348 (thirty percent of that year's transfer docket), this year the court disposed of 367 civil transfer petitions (forty percent of its transfer docket).²⁷⁷ During the fiscal year ending June 30, 2007, the Indiana Supreme Court issued forty-three opinions where jurisdiction arose from the granting of a petition to transfer in a civil or tax case.²⁷⁸ This number marked a decrease from sixty-one the year before.²⁷⁹

During the 2006-2007 fiscal year, the Indiana Supreme Court disposed of 1096 total cases, 925 (eighty-four percent) of which involved appeals that originated in the court of appeals.²⁸⁰ What has remained consistent is the remarkably high percentage (ninety-two percent in 2006-07) of cases in which the court of appeals's decision was final, leaving only eight percent of the 925

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 712.

273. *Id.*

274. *Id.* (omissions in original) (quoting IND. APP. R. 45(B)(1)(b)).

275. *Id.* (emphasis omitted).

276. See DIV. OF SUPREME COURT ADMIN., INDIANA SUPREME COURT, ANNUAL REPORT 2006-07, at 3, 39 (2007), available at <http://www.in.gov/judiciary/supremeadmin/docs/0607report.pdf>.

277. *Id.*

278. See *id.* at 2.

279. *Id.*

280. *Id.*

petitions to transfer addressed by the supreme court resulting in an opinion or published dispositive order.²⁸¹ The Indiana Supreme Court specifically commended the court of appeals and judges from the approximately 300 Indiana trial courts for their “high-quality work.”²⁸²

CONCLUSION

It was another good year with plenty of opinions addressing various issues arising under the Indiana Rules of Appellate Procedure. If anything is clear, it is that the Indiana Court of Appeals is primarily responsible for interpreting and enforcing these Rules, given the sheer number of opinions that court issues every reporting period. The changes to the Rules, effective January 1, 2008, are intended—as they are every year—to clarify and improve the procedural aspects of practicing under the Rules. Only time will tell, but the new Rules seem geared to accomplish their intended mission.

281. *Id.*

282. *Id.*

RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

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During the survey period,¹ the Indiana Supreme Court and the Indiana Court of Appeals rendered numerous decisions addressing principles of state procedural law and providing helpful interpretations of the Indiana Rules of Trial Procedure.

I. INDIANA SUPREME COURT DECISIONS

A. *Personal Jurisdiction Reduced to One-Step Analysis*

In 2003, Indiana Trial Rule (“Rule”) 4.4(A)—Indiana’s “long arm” jurisdiction statute—was amended to include the following language: “In addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States.”² In *LinkAmerica Corp. v. Albert*,³ the Indiana Supreme Court clarified that the 2003 amendment to Rule 4.4(A), despite its retention of other specific, enumerated acts satisfying long-arm jurisdiction, collapses the personal jurisdictional inquiry into a single step: “The 2003 amendment to [Rule 4.4(A)] was intended to, and does, reduce analysis of personal jurisdiction to the issue of whether the exercise of personal jurisdiction is consistent with the Federal Due Process Clause.”⁴

B. *Preferred Venue*

Rule 75 governs venue requirements in Indiana.⁵ Rule 75(A) contains ten subsections, each setting forth criteria for establishing “preferred” venue.⁶ A complaint can be filed in any county in Indiana.⁷ However, if the complaint is not filed in a preferred venue, the court is required to transfer the case to a preferred venue upon the proper request of a party.⁸ Rule 75(A) “does not create

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—October 1, 2006, through September 30, 2007—as well as amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period.

2. IND. TRIAL R. 4.4(A).

3. 857 N.E.2d 961 (Ind. 2006).

4. *Id.* at 967. The *LinkAmerica* decision is discussed in greater detail in last year’s civil procedure survey. See Michael A. Dorelli, *Recent Developments in Indiana Civil Procedure*, 40 IND. L. REV. 705, 705-07 (2007).

5. IND. TRIAL R. 75.

6. IND. TRIAL R. 75(A).

7. *Id.*

8. *Id.*

a priority among the subsections establishing preferred venue.”⁹ Rather, if a complaint “is filed in a county of preferred venue, then the trial court has no authority to transfer the case based solely on preferred venue in one or more other counties.”¹⁰

1. *Location of Defendant Organization’s “Registered Office.”*—Rule 75(A)(4) establishes preferred venue in “the county where . . . the principal office of a defendant organization is located.”¹¹ Rule 75(A)(10) applies when the case is not subject to the requirements of subsections (1) through (9), or “if all the defendants are nonresident individuals or nonresident organizations without a principal office in the state.”¹²

In *American Family Insurance Co.*, the court held that “the term ‘principal office’ as used in subsections (4) and (10) of Trial Rule 75(A) refers to a domestic or foreign corporation’s registered office in Indiana.”¹³ American Family, as a Spencer County resident’s subrogee, sued Ford in Marion County on negligence and breach of warranty claims. Ford, a Delaware corporation with its headquarters in Michigan, filed a motion to transfer venue to Spencer County.¹⁴ Ford has no offices in Indiana, but maintains a registered agent—CT Corporation—in Marion County.¹⁵ The trial court granted Ford’s motion to transfer venue, and the Indiana Court of Appeals reversed, holding that “Marion County was a preferred venue under [Rule] 75(A)(10).”¹⁶

On transfer, based on a review of the history of Indiana’s Business Corporation Act, the Indiana Supreme Court clarified that “subsection (4) of Trial Rule 75 establishes preferred venue in the county of the defendant organization’s registered office.”¹⁷ Ford had designated CT Corporation, located in Marion County, as its registered agent; therefore, the court concluded that Marion County was a preferred venue under subsection (4) of Rule 75.¹⁸

The court in *American Family Insurance* also clarified that subsection (10) of Rule 75(A)—preferred venue in the county of plaintiff’s “residence” or “office”—applies in two independent circumstances: “(1) when none of the preceding nine subsections establish preferred venue *or* (2) when all of the

9. *Am. Family Ins. Co. v. Ford Motor Co.*, 857 N.E.2d 971, 974 (Ind. 2006) (citing *Bostic v. House of James, Inc.*, 784 N.E.2d 509, 511 (Ind. Ct. App. 2003)).

10. *Id.* (citing *Meridian Mut. Ins. Co. v. Harter*, 671 N.E.2d 861, 863 (Ind. 1996)).

11. IND. TRIAL R. 75(A)(4).

12. IND. TRIAL R. 75(A)(10).

13. *Am. Family Ins.*, 857 N.E.2d at 972.

14. *Id.* at 972-73.

15. *Id.* at 972.

16. *Id.* at 973 (citing *Am. Family Ins. Co. v. Ford Motor Co.*, 848 N.E.2d 319 (Ind. Ct. App.), *vacated*, 857 N.E.2d 971 (Ind. 2006)).

17. *Id.* at 975.

18. *Id.*; *cf.* *Coffman v. Olson & Co.*, 872 N.E.2d 145, 148-49 (Ind. Ct. App. 2007) (distinguishing *American Family Insurance* and holding that Rule 75(A)(4) established preferred venue in the county in which defendant maintained a “nonprincipal office,” because the office was not merely a “mailing address”).

defendants are nonresident individuals or nonresident organizations without a ‘principal office in the state.’”¹⁹ The court explained that “because Ford has a principal office in [this] state [i.e., via CT Corporation, its registered agent], subsection (4) applies and . . . so neither circumstance triggering the applicability of subsection (10) is present.”²⁰

2. *Location of Damaged Chattels.*—Rule 75(A)(2) provides, inter alia, that preferred venue lies in the county where “the chattels or some part thereof are regularly located or kept, if the complaint includes a claim for injuries thereto or relating to . . . such chattels.”²¹ Rule 75(A)(3) provides for preferred venue in “the county where the accident or collision occurred, if the complaint includes a claim for injuries relating to the operation of a motor vehicle.”²²

In *R & D Transport, Inc. v. A.H.*,²³ the court held that the “damage caused to chattels in an automobile accident is subsumed by [Rule 75(A)(3)], not authorized under [Rule 75(A)(2)] as a way for a plaintiff to be able to sue in the plaintiff’s county of residence.”²⁴ The plaintiff, a Porter County resident, filed suit in Porter County against a Hendricks County resident and a corporation with its principle place of business in Hendricks County. The complaint alleged personal, physical, and psychological injuries resulting from a vehicular accident, including damage, to plaintiff’s “orthotic devices, clothing, and other chattels regularly located in Porter County.”²⁵ The accident occurred in Dearborn County.²⁶ The defendants moved to transfer venue to either Hendricks or Dearborn County. The trial court denied the motion, and the Indiana Court of Appeals affirmed.²⁷

The Indiana Supreme Court reversed, expressly disapproving of the prior Indiana Court of Appeals’ decisions in *Swift v. Pirnat*²⁸ and *Halsey v. Smeltzer*,²⁹ in which the courts held that preferred venue lied in the county in which personal

19. *Am. Family Ins.*, 857 N.E.2d at 977.

20. *Id.* The court in *American Family Insurance* also addressed the applicable standard of review on a trial court’s order on a motion to transfer venue. *Id.* at 973. The court explained that “factual findings linked to a ruling on a motion under Rule 75(A) are reviewed under a clearly erroneous standard and rulings of law are reviewed de novo.” *Id.* (abrogating *Monroe Guar. Ins. Co. v. Berrier*, 827 N.E.2d 158, 159 (Ind. Ct. App. 2005)). According to the court, however, “[i]f factual determinations are based on a paper record, they are also reviewed de novo.” *Id.* (citing *Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm’n*, 758 N.E.2d 34, 37 (Ind. 2001)).

21. IND. TRIAL R. 75(A)(2).

22. IND. TRIAL R. 75(A)(3).

23. 859 N.E.2d 332 (Ind. 2006).

24. *Id.* at 337.

25. *Id.* at 333.

26. *Id.*

27. *Id.*

28. 828 N.E.2d 444 (Ind. Ct. App. 2005), *disapproved by R & D Transport, Inc.*, 859 N.E.2d 336-37.

29. 722 N.E.2d 871 (Ind. Ct. App. 2000), *disapproved by R & D Transport, Inc.*, 859 N.E.2d 336-37.

property allegedly damaged in automobile accidents was “regularly located,” under Rule 75(A)(2).³⁰ The supreme court stated that “[t]he language and structure of [Rule] 75(A) dictate that these cases were wrongly decided.”³¹ The court in *R & D Transport* identified three reasons for this conclusion:

First, the focus of [Rule] 75(A)(2) is the location of the property or activity that gives rise to a claim. . . .

. . . .

Second, consistent with the rule’s stress on the location of the property or activity giving rise to a claim, we have long had special venue rules for motor vehicle accidents. . . .

. . . .

Third, we note the rule’s language about the relationship between plaintiffs and venue. Subsection (10) of the rule allows for the plaintiff’s home county to be a preferred venue if “the case is not subject to the requirements of subsections (1) through (9) of [Rule 75(A)] or if all the defendants are nonresident individuals or nonresident organizations without a principal office in the state.”³²

The court explained that “[t]he text of subsection (10) suggests that, in most cases, the plaintiff’s home county has secondary status when it comes to preferred venue.”³³ The court concluded that the “decisions of the Court of Appeals in [*Swift*], [*Halsey*], and their companions are contrary to the intent of [Rule] 75(A) and are disapproved” and held that Porter County was not a county of preferred venue.³⁴

C. Relation Back of Amendments to Pleadings

In *Porter County Sheriff Department v. Guzorek*,³⁵ the Indiana Supreme Court held that “an amended complaint adding the sheriffs’ department as a defendant relate[d] back to the date of the original complaint [filed against the officer in his individual capacity] and [was] therefore not barred by the statute of limitations if the original action was timely filed.”³⁶ In *Guzorek*, a county sheriffs’ department officer had rear-ended plaintiff’s vehicle. Nineteen days

30. *R & D Transport*, 859 N.E.2d at 334 (citing *Swift*, 828 N.E.2d at 448-49; *Halsey*, 722 N.E.2d at 873-74).

31. *Id.*

32. *Id.* at 335-36 (quoting IND. TRIAL R. 75(A)(10)).

33. *Id.* at 336.

34. *Id.* at 336-37. The court reasoned that “[m]ost people ‘regularly ke[ep]’ their car and other chattels that travel with them in their cars in their home counties.” *Id.* at 336. The court “decline[d] to allow [Rule] 75(A)(2) to serve as the means to bypass the clear intent of the rule’s overall text.” *Id.*

35. 857 N.E.2d 363 (Ind. 2006).

36. *Id.* at 366.

later, plaintiff sent a Tort Claims Act notice to various government agencies.³⁷ Five days before expiration of the two-year negligence statute of limitations, plaintiff filed a complaint naming the officer as the only defendant.³⁸

The complaint did not mention the sheriffs' department or the officer's employment with the department. The officer moved for summary judgment claiming "no personal liability."³⁹ While the motion for summary judgment was pending, plaintiff moved for leave to amend the complaint to add the sheriffs' department as a defendant. The trial court granted summary judgment in favor of the individual officer, the trial court then granted leave to amend to add the department,⁴⁰ the department moved for summary judgment, on statute of limitations grounds, and the trial court denied the motion (finding that the amendment related back to the date of original filing for statute of limitations purposes).⁴¹ The trial court certified the summary judgment denial for interlocutory appeal, the Indiana Court of Appeals reversed (directing that summary judgment be granted in favor of the department), and the Indiana Supreme Court granted transfer.⁴²

Following a description of the evolution of Rule 15(C) and its federal counterpart,⁴³ the court in *Guzorek* paraphrased the relevant provision of the Rule:

[I]n order for an amendment of a complaint to relate back under Trial Rule 15(C), no later than 120 days after the complaint is filed a defendant must receive notice of the pendency of the action and be aware that, but for a mistake, that defendant would have been named in the original complaint.⁴⁴

Applying Rule 15(C) to the case, the court in *Guzorek* first analyzed the "notice" requirement of the Rule, explaining that:

Notice of the lawsuit may be actual notice or constructive notice, which may be inferred based on either the identity of interest between the old and new parties or the fact that they share attorneys. An identity of interest may permit notice to be imputed to the added party when the

37. *Id.*

38. *Id.*

39. *Id.*

40. The department was represented by the same counsel who had represented the officer.
Id.

41. *Id.*

42. *Id.*

43. *Id.* at 367-68. The court in *Guzorek* recognized that Rule 15(C) was modeled after Federal Rule 15(C) and that "[s]ubsequent amendments to the Indiana rule have conformed to changes in the federal rule." *Id.* at 367. Thus, the court concluded that it was "appropriate to consider federal authorities as guidelines in interpreting and applying the Indiana rule." *Id.* (citing *Honda Motor Co. v. Parks*, 485 N.E.2d 644, 649 (Ind. Ct. App. 1985)).

44. *Id.* at 368.

original and added party “are so closely related in business or other activities that it is fair to presume that the added part[y] learned of the institution of the action shortly after it was commenced.” Similarly, notice may be imputed based on shared legal counsel if it is reasonable to infer that the attorney for the initial party will have communicated to the added party that he, she or it may be joined in the action.⁴⁵

The court found that notice was “fairly inferred,”⁴⁶ because the department was required to defend the officer and both the officer and the department were represented by the same counsel.⁴⁷

The court next analyzed the “knowledge of mistake” requirement—an issue that sparked an interesting debate between the majority, authored by Justice Boehm, and the dissent, penned by Chief Justice Shepard. Per the majority, the “mistake” requirement is satisfied “in instances involving both mistakes of fact and mistakes of law.”⁴⁸ According to the majority:

“The ‘mistake’ condition does not isolate a specific type or form of error in identifying parties, but rather is concerned fundamentally with the new party’s awareness that failure to join it was error rather than deliberate strategy.” Contrary to the suggestion of the dissent, [Rule 15(C)] is not limited to misnomers: “In view of the history of the application of Rule 15(C), the phrase ‘a mistake concerning the identity of the proper party’ should clearly not be read to limit its usefulness to cases of misnomer.” Specifically, a mistake of applicable law can constitute a “mistake” as that term is used in Trial Rule 15(C).⁴⁹

The majority agreed with the dissent that “where there is a basis for the plaintiff to assert liability against the party named in the complaint, and there is no reason for another party to believe that the plaintiff did anything other than make a deliberate choice between potential defendants, the mistake requirement is not met.”⁵⁰ The court further explained that “[i]t is not a reasonable assumption that an opponent’s legal strategy was to sue a party who was provided immunity by statute and to omit the party designated as the proper defendant.”⁵¹ The court

45. *Id.* at 369 (citations omitted). The court also found that the tort claim notice sent by the plaintiff to the sheriffs’ department did not satisfy Rule 15(C)’s notice requirement, because it informed the department of the accident, but it “did not advise that a lawsuit had been filed.” *Id.*

46. *Id.* at 371.

47. *Id.* at 369 (stating that “[e]ither of these may be sufficient to find notice to [the department] under some circumstances, but in concert they are conclusive under the facts of this case”).

48. *Id.* at 371.

49. *Id.* (quoting *In re Integrated Res. Real Estate Ltd. P’ship Sec. Litig.*, 815 F. Supp. 620, 644 (S.D.N.Y. 1993)).

50. *Id.* at 372.

51. *Id.* The court elaborated, stating that “[t]he dissent characterizes the [plaintiff’s] decision to sue the individual officer rather than the sheriff’s department as a legal or tactical choice.” *Id.*

therefore concluded that “[s]uch a mistake of applicable law—suing the agency that is immune instead of the secretary who is not—is precisely the situation that gave rise to [the federal rule upon which Indiana Rule 15(C) is patterned].”⁵² The court affirmed the trial court’s ruling denying the department’s summary judgment motion based on the relation-back of the plaintiff’s amendment.⁵³

As noted by the majority’s opinion, Chief Justice Shepard offered a spirited dissent on the “mistake of identity” issue, opining that the majority’s decision “is against the weight of federal and Indiana authority.”⁵⁴ The Chief Justice explained that:

Justice Boehm’s opinion . . . swims upstream against both federal and Indiana authority about the meaning of “mistake of identity” by sweeping within Rule 15(C) any mistake, including legal bad calls about who among multiple possible defendants might be liable. His opinion acknowledges the principle that where a party makes a “deliberate choice between potential defendants, the mistake requirement is not met,” but does not apply this principle to the facts before us. Justice Boehm reasons that the [plaintiff] could not have deliberately planned “to sue an immune party who was provided immunity by statute and to omit the party designated as the proper defendant.” In effect, this focuses on the idea that the [plaintiff] made a legal mistake that could be remedied by Rule 15(C). Under such reasoning, virtually everyone who chooses to name a given defendant and later finds the choice an unhappy one could lay legitimate claim to “mistake of identity.”⁵⁵

In his dissent, Chief Justice Shepard explained that “the inquiry under Rule 15(C) does not focus on whether the claimant’s lawyer botched the job, but rather whether the party sought to be added after the statute of limitations ‘knew or should have known that but for a mistake concerning the identity of the proper party’ he, she, or it would have been sued in the first place.”⁵⁶ The dissent concluded with an implicit warning: “Rule 15[(C)] was amended to allow relation back where a plaintiff’s honest error results in a mistake of identity. Rule 15[(C)] was not intended to save parties from the legal or tactical choices

The majority, however, distinguished the cases cited in Chief Justice Shepard’s dissent, stating that “[t]he cases the dissent cites are markedly different from the present one [in that] . . . [n]one involves a suit against a clearly immune party and all involve a rational decision to sue one party and not another.” *Id.*

52. *Id.* at 373.

53. *Id.*

54. *Id.* (Shepard, C.J. dissenting) (“I see no reason why Indiana should be an outlier on this question, and the majority opinion does not undertake to provide a reason for placing us against the mainstream.”).

55. *Id.* at 374.

56. *Id.* (“On this point, the majority opinion deals with the facts summarily and gets them wrong.”).

made by their lawyers.”⁵⁷

D. Interpleader

In *Porter Development, LLC v. First National Bank of Valparaiso*,⁵⁸ the court interpreted and applied Indiana’s Adverse Claim Interpleader Statute (“Statute”), which provides that “[i]f a depository financial institution pays . . . funds to the court, the depository financial institution *is entitled* to recover and collect the costs and expenses, including attorney’s fees, incurred . . . in the interpleader action.”⁵⁹ Specifically, a depository bank filed an interpleader complaint against a depositor and the depositor’s secured creditor to resolve competing claims to a certificate of deposit.⁶⁰ The depositor counterclaimed against the bank, alleging abuse of process, and breaches of contract, trust, and fiduciary duty. Following cross-motions for summary judgment, the trial court ruled that interpleader was proper, but denied the bank’s claim for attorney fees under the Statute, explaining that the Statute “reads ‘is entitled,’ not ‘shall.’”⁶¹ Cross-appeals followed, and the court of appeals affirmed.

On transfer, the Indiana Supreme Court disagreed with the court of appeals and reversed and remanded the matter for further proceedings.⁶² Through statutory interpretation and a review of case law in other jurisdictions, the court in *Porter* agreed with and adopted the “prevailing approach” regarding whether and how attorney fees are recoverable by an interpleading depository institution, explaining as follows:

[T]he prevailing approach is to allow the interpleading stakeholder [*i.e.*, the depository institution] to recover its attorney fees directly from the deposited fund before it is distributed to the prevailing claimant and, as between competing claimants, to require those claimants whose claims

57. *Id.* at 375. Subsequently, Justice Boehm denied the department’s petition for rehearing, reiterating that “the ‘mistake’ requirement of [Rule 15(C)] is satisfied when a plaintiff mistakenly sues an immune party if the proper party knows of the suit and knows that an error has been made.” *Porter Co. Sheriff Dep’t v. Gozorek*, 862 N.E.2d 254, 255 (Ind. 2007) (stating “[t]hat is one of the prototypical situations [Federal Rule 15(c)] was initially designed to address”). According to Justice Boehm, “[w]e see no reason to impose a penalty on a plaintiff for a mistake of law that has gained no advantage for the plaintiff and caused no disadvantage to the defendant.” *Id.* at 256. In his dissent, Chief Justice Shepard argued that “[t]he petition for rehearing in this case further demonstrates the extent to which this Court’s interpretation of Trial Rule 15(c)’s ‘mistake of identity’ requirement to allow relation back takes us outside the mainstream of authority.” *Id.* (Shepard, C.J., dissenting). The dissent, on rehearing, argued that “mistakes of liability are not the type of ‘mistakes’ contemplated by Rule 15(C).” *Id.* at 257 (citing *Hall v. Norfolk S. Ry. Co.*, 469 F.3d 590, 596-97 (7th Cir. 2006)).

58. 866 N.E.2d 775 (Ind. 2007).

59. IND. CODE § 28-9-5-3 (2004) (emphasis added).

60. *Porter*, 866 N.E.2d at 776-77.

61. *Id.* at 777.

62. *Id.* at 780-81.

to the fund are rejected to replenish the fund or reimburse the prevailing claimant.⁶³

However, the court recognized that this approach may be inappropriate in certain “unusual circumstances, such as when the interpleading stakeholder incurs additional attorney fees and costs beyond the reasonable and ordinary expenses associated with the prosecution of an interpleader proceeding.”⁶⁴

The court in *Porter* concluded that the Statute is *mandatory*, extending to “all reasonable costs and expenses incurred by a depository financial institution with respect to the interpleader action or proceeding.”⁶⁵ The court clarified, however, that “such right to recovery includes only those costs and expenses that are expended in bringing a proper interpleader, or successfully defending its use of interpleader.”⁶⁶ If deposited funds are insufficient, the court “may impose such costs and expenses upon unsuccessful claimants whose claims led to the interpleader and deposit of funds with the court.”⁶⁷

E. “Lazy” Judge

Rule 53.2 provides that “[w]henever a cause . . . has been tried to the court and taken under advisement by the judge, and the judge fails to determine any issue of law or fact within ninety (90) days,” upon the request of an interested party, the Clerk of the court must withdraw submission of all pending issues from the judge and seek appointment of a special judge by the Indiana Supreme Court.⁶⁸ An exception to the mandatory withdrawal of all issues by the Clerk applies where “[t]he parties who have appeared or their counsel stipulate or agree on record that the time limitation for decision set forth in this rule shall not apply.”⁶⁹

In *State ex rel. Hoffman v. Allen Circuit Court*,⁷⁰ the court held as a matter of first impression that “a trial court may not avoid its obligation to make timely decisions by issuing . . . an order presuming agreement to extend the time absent objection from the parties.”⁷¹ In *Hoffman*, the trial court conducted a bench trial on issues of child custody, parenting time, and child support.⁷² The trial court ordered proposed findings of fact and conclusions of law, and instructed in its order that “[t]he time within which the Court is to rule on the issues shall not begin to run until said Findings of Fact and Conclusions of Law are filed unless

63. *Id.* at 780.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. IND. TRIAL R. 53.2(A).

69. IND. TRIAL R. 53.2(B)(1).

70. 868 N.E.2d 470 (Ind. 2007).

71. *Id.* at 472.

72. *Id.*

either party files an objection . . . within five (5) days.”⁷³ Neither party objected within the five day period. Instead, the parties agreed to successive extensions of their deadlines for the filing of findings and conclusions.⁷⁴

On the ninety-first day after the conclusion of the trial, counsel for the father filed his Rule 53.2 praecipe, seeking removal of the case from the judge and appointment of a special judge.⁷⁵ Four days later, the trial court entered a final judgment, granting “legal custody to the mother, establish[ing] parenting time for the father, and order[ing] child support.”⁷⁶ In a subsequent entry, the Clerk provided “notice” of her decision not to withdraw the case in response to the father’s Rule 53.2 praecipe, “explaining that the father’s failure ‘to object and the multiple requests for extension of time may be deemed to be an agreement as to the Court’s delay.’”⁷⁷ The father filed a petition for writ of mandamus, challenging the Clerk’s failure to withdraw the case from the trial court.⁷⁸

Despite denying the petition for writ of mandamus, the Indiana Supreme Court admonished similar “presumptions” of agreement to extend a trial court’s timeline for ruling, explaining as follows:

[W]e take this opportunity to disapprove future use of devices such as the order presuming agreement absent objection to extend a court’s time for ruling. To provide guidance to the bench and bar, we hold that a trial court may not avoid its obligation to make timely decisions by issuing such an order presuming agreement to extend the time absent objection from the parties. The exception provided in the rule means exactly what it says. It applies only where the parties “stipulate or agree on record that the time limitation for decision set forth in this rule shall not apply.” The failure of parties to object to a judicial declaration presuming their agreement does not satisfy this requirement that they stipulate or agree on the record.⁷⁹

The court continued, explaining that “[t]he ninety-day requirement for judicial action operates irrespective of whether proposed findings and conclusions are contemplated.”⁸⁰ According to the Indiana Supreme Court, “[r]eceiving proposed findings of fact and conclusions of law from the respective parties may be a judicial convenience, but it is not a necessity to a court’s decision-making function.”⁸¹

73. *Id.* at 471-72.

74. *Id.* at 472.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 471 (indicating that writ was denied on May 15, 2007, and that an “explanatory opinion” would follow).

79. *Id.* at 472-73 (citation omitted).

80. *Id.* at 473.

81. *Id.*

F. Relief from Judgment Due to “Misconduct” During Discovery and Trial

In *Outback Steakhouse of Florida, Inc. v. Markley*,⁸² the court held that the plaintiffs’ failure to identify a critical witness in response to defendants’ discovery, “in concert with other acts and omissions attributable to plaintiffs’ counsel, constituted misconduct requiring a new trial.”⁸³ Plaintiffs were severely injured when the motorcycle they were riding was struck by the car of an intoxicated man who had been drinking at Outback Steakhouse. Plaintiffs sued Outback alleging various alcohol related statutory and common law violations, including a claim that Outback “knowingly served alcohol to a visibly intoxicated person.”⁸⁴

Outback served interrogatories on the plaintiffs, requesting that plaintiffs identify all facts supporting their contention that Outback provided alcoholic beverages to the man with knowledge that he was visibly intoxicated.⁸⁵ In response to the interrogatory, plaintiffs identified several individuals who were at Outback the night of the accident, but they failed to identify a waitress who had previously informed plaintiffs’ counsel that the man was visibly intoxicated when she served him the night of the accident.⁸⁶ Outback later deposed the waitress. At her deposition, she testified that the man was not visibly intoxicated when she served him.⁸⁷

During the trial, the waitress contacted counsel for plaintiffs and visited their office, informing counsel that she lied during her deposition and that she planned to testify at trial that the man was visibly intoxicated when she served him.⁸⁸ Plaintiffs’ counsel did not inform the trial court or Outback of the meeting, nor did counsel seek to supplement the interrogatory answer.⁸⁹ When trial resumed, plaintiffs called the waitress as a witness and she testified that the man “was visibly intoxicated . . . , that she continued to serve him after she realized he was intoxicated, and that she felt guilty and responsible for the collision.”⁹⁰ The jury returned a verdict in the amount of \$60 million—\$39 million of which was allocated to Outback.⁹¹ Outback filed a motion to correct errors and a motion for new trial under Rule 60(B), characterized as being on the basis of “fraud, misrepresentation, or misconduct.”⁹² The trial court denied all post-trial relief,

82. 856 N.E.2d 65 (Ind. 2006).

83. *Id.* at 70.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 71.

88. *Id.*

89. *Id.*

90. *Id.* at 71-72. Outback impeached the waitress with her deposition on cross-examination, but did not ask that her testimony be stricken or that a continuance be granted. *Id.* at 72.

91. *Id.*

92. *Id.* Outback conducted post-trial discovery pursuant to Rule 60(D), including a post-trial deposition of the waitress during which she revealed that she had informed plaintiffs’ counsel

and the Indiana Court of Appeals affirmed.⁹³

Using federal case law for interpretive guidance, the court in *Outback Steakhouse* determined that, for purposes of Rule 60(B)(3), “misconduct” includes “both negligent and intentional violations of Indiana’s discovery rules.”⁹⁴ The court explained that, before a new trial will be granted due to “misconduct” under Rule 60(B)(3), a movant must demonstrate that the misconduct “prevented the movant from fully and fairly presenting the movant’s case at trial.”⁹⁵ In addition, the moving party must demonstrate “a meritorious claim or defense.”⁹⁶ The court explained that the “meritorious defense” requirement “merely requires a prima facie showing of a meritorious defense, that is, a showing that ‘will prevail until contradicted and overcome by other evidence.’”⁹⁷ In summary, the court in *Outback Steakhouse* concluded that for Outback to prevail under Rule 60(B)(3), it must demonstrate:

- (1) the plaintiffs’ discovery responses amounted to either fraud, negligent misrepresentation, or misconduct; (2) the fraud, misrepresentation, or misconduct prevented Outback from fully and fairly presenting its case at trial; and (3) Outback has made a prima facie showing of a meritorious defense as to liability or that the damages were excessive.⁹⁸

The court in *Outback Steakhouse* found that the plaintiffs’ failure to disclose the waitress “as a person with knowledge of the relevant facts was a negligent if not intentional breach of its discovery obligations.”⁹⁹ The court first “readily conclude[d] that the initial omission [of the waitress’s expected testimony from the plaintiffs’ original interrogatory answer] was a violation of [Rules] 26 and 33 and therefore ‘misconduct’ within the meaning of Rule 60(B)(3).”¹⁰⁰ The court then explained that even if the plaintiffs’ attorneys had a doubt about whether the waitress needed to be disclosed in response to the interrogatory, that doubt should have been “resolved by the obligation to construe an interrogatory fairly.”¹⁰¹ According to the court, “[i]nterrogatories should not ‘be interpreted with excessive rigidity or technicality, but a rule of reason should be applied.’”¹⁰²

before trial that she knew the man was intoxicated when she served him. *Id.*

93. *Id.*

94. *Id.* at 73.

95. *Id.*

96. *Id.*

97. *Id.* (quoting *Smith v. Johnson*, 711 N.E.2d 1259, 1265 (Ind. 1999)).

98. *Id.* at 74.

99. *Id.*

100. *Id.* at 77.

101. *Id.* at 75.

102. *Id.* at 75-76 (quoting *Pilling v. Gen. Motors Inc.*, 45 F.R.D. 366, 369 (D. Utah 1968)); see also *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003) (cited in *Outback Steakhouse*, 856 N.E.2d at 76, for the proposition that “incomplete or evasive responses to interrogatories support dismissal of an action”).

Next, the court found “misconduct” in the plaintiffs’ failure to supplement their interrogatory answer once they decided to call the waitress at trial.¹⁰³ The court explained that the duty to supplement discovery responses under Rule 26(E) continues even after trial has begun.¹⁰⁴ In addition, the court rejected the plaintiffs’ arguments that the waitress’s expected testimony constituted protected attorney work product¹⁰⁵ and that Outback waived its objection to the plaintiffs’ failure to supplement their discovery responses by cross-examining the waitress instead of moving for a continuance.¹⁰⁶ The court reasoned, in part, that Outback had no reason to move for a continuance when the waitress was called, because it had no reason to believe she would not adhere to her prior deposition testimony.¹⁰⁷

The court also concluded that the plaintiffs’ counsel’s closing argument—during which he claimed Outback’s counsel was disingenuous during opening statements when he represented that the waitress would testify that the man was not intoxicated—amounted to “misconduct” in light of the discovery violations.¹⁰⁸ The court proceeded to find that the misconduct prejudiced Outback’s right to a fair trial—due in large part to plaintiffs’ counsel’s closing argument attack on Outback’s counsel—and that Outback presented a “meritorious defense” sufficient to warrant relief under Rule 60(B)(3).¹⁰⁹

G. Arbitration

In *Natare Corp. v. D.S.I., Duraplastec Systems, Inc.*,¹¹⁰ the court held that an arbitrator did not exceed his authority in denying a prevailing party’s attorney fees, despite a contract provision providing for an award of reasonable fees to the prevailing party.¹¹¹ In connection with the settlement of two lawsuits, Natare and D.S.I. agreed not to disseminate disparaging information about each other. The parties agreed to arbitrate any disputes “arising out of or relating to” their settlement agreement, and they agreed that if a party breached the agreement, the non-breaching party would be entitled to \$5000 in liquidated damages, actual

103. *Outback Steakhouse*, 856 N.E.2d at 77.

104. *Id.* at 77-78 (stating that “it may be reasonable and appropriate to modify the method of supplementing a discovery response if new information is discovered on the eve of or during trial”).

105. *Id.* at 78 (noting that the work product privilege exists to protect “mental impressions or legal theories” of the attorneys or clients and that the waitress’s statement did not reveal such impressions but were “simply potential evidence that enjoys no privilege”).

106. *Id.* at 78-79.

107. *Id.* at 79.

108. *Id.* at 79-80.

109. *Id.* at 80-82. The court in *Outback Steakhouse* recognized “that the effect of ordering a new trial is once again to make the [plaintiffs] innocent victims, this time at the hands of their own lawyers.” *Id.* at 81. But, the court explained, the plaintiffs “chose their counsel and this series of missteps by plaintiffs’ counsel produced a severely unfair trial.” *Id.* at 81-82.

110. 855 N.E.2d 985 (Ind. 2006).

111. *Id.*

damages “if shown,” and reasonable attorney fees, costs, and expenses incurred pursuing the claim.¹¹²

Several years later, *Natare* claimed D.S.I. breached the non-disparagement agreement, causing actual damages.¹¹³ After arbitration pursuant to the settlement agreement, the arbitrator found that D.S.I. breached the agreement, but that *Natare* failed to show actual damages.¹¹⁴ The arbitrator awarded \$5000 in liquidated damages, no actual damages, and no attorney fees or costs. *Natare* sought judicial review of the arbitrator’s decision to award no attorney fees. The trial court upheld the award, and the Indiana Court of Appeals reversed, holding that the arbitrator exceeded his authority in failing to award reasonable attorney fees to *Natare* as the prevailing party.¹¹⁵

On transfer, the Indiana Supreme Court quoted the full text of the sections of Indiana’s Uniform Arbitration Act,¹¹⁶ pursuant to which an arbitration award may be set aside, and explained that “an arbitration award should not be set aside unless grounds specified in the Act have been shown, and appellate review of an arbitration award is limited to the determination of such a showing.”¹¹⁷ Regarding the arbitrator’s “authority” to award no fees despite contract language providing for an award of fees to the prevailing party, the court in *Natare* explained as follows:

[T]he arbitrator clearly had the authority not to award attorney fees under the terms of the settlement agreement if the arbitrator concluded that the amount of “reasonable attorney fees” to which *Natare* was entitled was zero. . . .

. . . .

. . . The facts and circumstances of this arbitration clearly point to the arbitrator having exercised his responsibility to consider whether the award of any attorney fees was reasonable here. Without indulging in speculation as to any particular reason or reasons, it is enough to say that there are a number of plausible explanations for why the arbitrator could conclude that the reasonable amount of attorney fees in this circumstance was zero.¹¹⁸

In short, the court in *Natare* held that an arbitrator acts within his authority if—despite a contract provision providing for an award of reasonable attorney fees to the prevailing party—he determines that a “reasonable” fee under the

112. *Id.* at 985-86.

113. *Id.* at 986.

114. *Id.*

115. *Id.*

116. IND. CODE §§ 34-57-2-1 to -22 (2004).

117. *Natare Corp.*, 855 N.E.2d at 986.

118. *Id.* at 987-88.

circumstances is zero.¹¹⁹

H. Proceedings Supplemental

In *Rose v. Mercantile National Bank of Hammond*,¹²⁰ the Indiana Supreme Court discussed and evaluated proceedings supplemental generally, as well as changes of venue or judge, jury trial demands, fraudulent transfer, and “new” claims asserted in proceedings supplemental.¹²¹ A “[j]udgment creditor pursued . . . two shareholders of the judgment debtor through a proceeding supplemental contending fraudulent transfer, then amended the complaint to bring a new [Crime Victim’s Statute] claim, as well.”¹²²

The court in *Rose* explained that “[w]ith roots in equity, a proceeding supplemental offers the judgment creditor judicial resources ‘for discovering assets, reaching equitable and other interest[s] not subject to levy and sale at law and to set aside fraudulent conveyances.’”¹²³ The court described the procedure for bringing and responding to proceedings supplemental, generally, as follows:

A plaintiff may move for a proceeding supplemental in the court where judgment has been rendered by alleging that the plaintiff’s judgment will not be satisfied and that the defendant or another party has property that ought to be applied toward the judgment. And while Trial Rule 69(E) declares “[n]o further pleadings shall be required,” our caselaw teaches that “when a new issue arises in a proceeding supplemental, responsive pleadings are required.” Nonetheless, even when no new issue arises, a responsive pleading is still permitted. The court must then allow discovery and conduct a hearing, after which certain property shall be “applied towards the judgment.”¹²⁴

Regarding change of venue or judge, the court in *Rose* affirmed “the rule that third-party defendants in proceedings supplemental may engage the change of venue provisions in Trial Rule 76.”¹²⁵ The court explained that “[s]ince proceedings supplemental are merely the continuation of an original action, the original parties have already been afforded the chance to move the case to another court or judge.”¹²⁶ In *Rose*, the “third parties” seeking change of judge were the two principles of the original defendant.¹²⁷ The court stated that

119. *Id.* The court in *Natare* also concluded that “the issue of attorney fees was submitted to the arbitrator and that he clearly understood that it had been as he made a specific finding to that effect.” *Id.* at 988.

120. 868 N.E.2d 772 (Ind. 2007).

121. *Id.* at 775-77.

122. *Id.* at 773.

123. *Id.* at 775 (quoting *McCarthy v. McCarthy*, 297 N.E.2d 441, 444 (Ind. App. 1973)).

124. *Id.* (citations omitted).

125. *Id.* at 776.

126. *Id.* at 775-76.

127. *Id.* at 776.

“[w]hile they were not parties to the original action in a strict sense, this form will not prevent us from recognizing the substance.”¹²⁸ Therefore, the supreme court affirmed the trial court’s denial of the principals’ motion for change of judge.¹²⁹

Finally, the court in *Rose* rejected the plaintiff’s attempt to add an Indiana Crime Victim’s Statute claim, stating that such a “claim does not fit the purpose for proceedings supplemental.”¹³⁰ The court explained that

allowing a new claim to be tacked on at this stage would be just as unfitting as opening up any other litigation to add new claims after judgment. Such an approach to collections would lay the groundwork for perpetual motion—a far cry from the timely and efficient system of conflict resolution the nation’s judiciary strives to provide.¹³¹

The court concluded that “[p]roceedings supplemental are appropriate only for actions to enforce and collect existing judgments, not to establish new ones.”¹³²

II. INDIANA COURT OF APPEALS DECISIONS

A. Statute of Limitations

1. *Discovery Rule and Continuous Representation Doctrine.*—In *Bambi’s Roofing, Inc. v. Moriarty*,¹³³ the court held that a plaintiff’s negligence claim against an accounting firm was time-barred.¹³⁴ Specifically, the court held that the one-year statute of limitations imposed by the Accountancy Act of 2001¹³⁵ applied to the plaintiff’s particular claim.¹³⁶ The claim was time-barred despite Indiana’s “discovery rule,” and the continuous-representation doctrine—which the court held as a matter of first impression applied to accounting negligence claims covered by the Accountancy Act—did not apply under the present circumstances as a statute of limitations tolling mechanism.¹³⁷

In *Bambi’s Roofing*, an accounting firm continuously provided accounting services to Bambi’s from 1982 through 2003. In December 2000, Bambi’s hired an individual as their “in-house accounting officer,” at the accounting firm’s

128. *Id.*

129. *Id.* The court in *Rose* also addressed the propriety of a jury trial demand in a proceeding supplemental, explaining that “[w]hile juries are disfavored in proceedings supplemental for their tendency to prolong matters, where the pleadings form issues of fact that a jury could reasonably decide, the parties may demand a jury trial.” *Id.*

130. *Id.* at 777.

131. *Id.*

132. *Id.*

133. 859 N.E.2d 347 (Ind. Ct. App. 2006).

134. *Id.* at 359.

135. IND. CODE §§ 25-2.1-1-1 to -15-2 (2004 & Supp. 2007).

136. *Bambi’s Roofing*, 859 N.E.2d at 359.

137. *Id.*

recommendation.¹³⁸ One of the accounting firm's accountants trained the individual, while the firm continued to provide services to Bambi's.¹³⁹ On or before March 14, 2003, Bambi's discovered that the individual had embezzled more than \$76,900. The individual was fired and ultimately convicted and sentenced.¹⁴⁰ On July 2, 2004, nearly one year and four months after the embezzlement was discovered, Bambi's filed a complaint against the accounting firm, generally alleging negligence.¹⁴¹

After determining that Bambi's claims implicated the one-year statute of limitations contained in the Accountancy Act,¹⁴² the court in *Bambi's Roofing* addressed the statute of limitations accrual date under Indiana's "discovery rule," explaining as follows: "[T]he one-year limitations period is tolled until the date that the alleged negligence is discovered or should have been discovered by the exercise of reasonable diligence."¹⁴³ The court further noted that, "the discovery rule does not mandate that plaintiffs know with precision the legal injury that has been suffered, but merely anticipates that a plaintiff be possessed of sufficient information to cause him to inquire further in order to determine whether a legal wrong has occurred."¹⁴⁴ In other words, the court explained, "the discovery rule only postpones the statute of limitations by belated discovery of key facts, not by delayed discovery of legal theories."¹⁴⁵ Regarding the requirement that a party exercise "reasonable diligence," the court explained the following:

The exercise of reasonable diligence means simply that an injured party must act with some promptness where the acts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.¹⁴⁶

The court concluded that "Bambi's had knowledge of pertinent facts that reasonably put them on notice that some claim might exist against the [accounting firm] at the moment they discovered [the] embezzlement."¹⁴⁷ The court explained that at that time, "they necessarily must have been aware that a

138. *Id.* at 350.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 354-55 ("[W]e hold that Bambi's cause in negligence resulted from an agreement to provide professional accounting services and is therefore governed by the Accountancy's Act statute of limitations." (citing IND. CODE § 25-2.1-15-1 (2004))).

143. *Id.* at 355 (citing *Crowe, Chizek, & Co. v. Oil Tech., Inc.*, 771 N.E.2d 1203, 1207 (Ind. Ct. App. 2002)).

144. *Id.* at 356 (citing *Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683, 689 (Ind. Ct. App. 2006)).

145. *Id.* (citing *Perryman*, 846 N.E.2d at 689).

146. *Id.* (citing *Perryman*, 846 N.E.2d at 689).

147. *Id.*

claim might exist against the [accounting firm].”¹⁴⁸ Explaining that “the law does not require a smoking gun in order for the statute of limitations to commence,” the court concluded that, because the claim was filed more than one year after discovery of the embezzlement, Bambi’s claim against the accounting firm was time-barred.¹⁴⁹

Next, the court in *Bambi’s Roofing* ruled, as a matter of first impression, that the “continuous-representation” doctrine applies to accounting negligence claims covered by the Accountancy Act, as a statute of limitations tolling mechanism.¹⁵⁰ In evaluating the continuous-representation doctrine under the facts before it, the court clarified that “the continuous representation must be in connection with the specific matter directly in dispute, and not merely the continuation of a general professional relationship.”¹⁵¹ According to the court, “the mere recurrence of professional services does not constitute continuous representation where the later services performed are not related to the original services.”¹⁵² The court explained the rationale for limiting application of the doctrine to cases in which the representation is “in the same, specific matter,” as follows:

The purpose of the [continuous-representation doctrine] is to give accountants an opportunity to remedy their errors, establish that there was not error, or attempt to mitigate the damage caused by their errors, while still allowing the aggrieved client the right to later bring a malpractice action, and not to circumvent the statute altogether by continuously representing the client.¹⁵³

The court concluded that the doctrine did not apply to the present case, because the alleged “continuous” representation did not implicate the stated purposes of the doctrine.¹⁵⁴ In other words, according to the court, although the accountants’ representation may have been “continuous,” the alleged continuous representation did not give the accountants an opportunity to remedy their errors, establish that there was no error, or attempt to mitigate the damage caused by their alleged errors.¹⁵⁵

148. *Id.*

149. *Id.* But see *Brinkman v. Bueter*, 856 N.E.2d 1231, 1239-41 (Ind. Ct. App. 2006) (holding that patient could not reasonably have discovered, and limitations period for her medical malpractice claims therefore did not begin to run, until she became pregnant again and consulted with another obstetrician who provided high-risk obstetrical care), *vacated*, 879 N.E.2d 549 (Ind. 2008).

150. *Bambi’s Roofing*, 859 N.E.2d at 356-57.

151. *Id.* at 357 (citing *Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179, 197 (App. Div. 1998)).

152. *Id.* (citing *Ackerman*, 683 N.Y.S.2d at 197).

153. *Id.* at 358 (citing *Burns v. McClinton*, 143 P.3d 630, 634-35 (Wash. Ct. App. 2006)).

154. *Id.* at 359.

155. *Id.*

2. *Contractual Statute of Limitations and Alleged Third-Party Beneficiary*.—In *Eckman v. Green*,¹⁵⁶ the court of appeals held that a contractual statute of limitations provision, contained in a modular home contract, did not apply to bar a claim by the purchasers against a third-party contractor.¹⁵⁷ Acknowledging that a “third party beneficiary may directly enforce a contract,”¹⁵⁸ the court explained the following:

[An alleged] third-party beneficiary must show the following: (1) A clear intent by the actual parties to the contract to benefit the third party; (2) A duty imposed on one of the contracting parties in favor of the third party; and (3) Performance of the contract terms is necessary to render the third party a direct benefit intended by the parties to the contract.¹⁵⁹

The court in *Green* concluded that the contractor failed “to meet the first criterion for establishing status as a third-party beneficiary.”¹⁶⁰ According to the court, the contract “[did] not show clear intent to benefit [the contractor] as [the contractor was] neither named in the purchase agreement nor [did] the purchase agreement contain ‘provisions which demonstrate an intent to benefit any other person.’”¹⁶¹ Rather, the court explained, the contract “addresse[d] only the rights and obligations of the . . . contracting parties.”¹⁶²

3. *Non-Resident Defendant and Due Process*.—Indiana Code section 34-11-4-1 tolls the statute of limitations when there is no agent for service of process in the state of Indiana.¹⁶³ Rule 4.4(B) provides that Indiana’s Secretary of State is deemed the agent for nonresidents who are subject to the jurisdiction of Indiana courts pursuant to Rule 4.4(A).¹⁶⁴ Rule 4.10 sets forth the procedures for service on the Secretary of State as agent for a nonresident.¹⁶⁵

In *Cadle Co. II, Inc. v. Overton*,¹⁶⁶ the court held that Rule 4.10, allowing a summons for a nonresident defendant to be served “constructively” on the Indiana Secretary of State, did not violate the due process rights of a nonresident for purposes of the statutory exception to the general rule that the statute of

156. 869 N.E.2d 493 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 216 (Ind. 2007).

157. *Id.* at 496-97.

158. *Id.* at 496 (citing *Mogensen v. Martz*, 441 N.E.2d 34, 35 (Ind. Ct. App. 1982)).

159. *Id.* “[T]he intent to benefit the third party is the controlling factor and may be shown by specifically naming the third party or by other evidence.” *Id.* (quoting *Luhnow v. Horn*, 760 N.E.2d 621, 628 (Ind. Ct. App. 2001)).

160. *Id.*

161. *Id.* (quoting *Horn*, 760 N.E.2d at 628).

162. *Id.* (quoting *Horn*, 760 N.E.2d at 628).

163. IND. CODE § 34-11-4-1 (2004) (“The time during which the defendant is a nonresident of the state is not computed in any of the periods of limitation except during such time as the defendant by law maintains in Indiana an agent for service of process or other person who, under the laws of Indiana, may be served with process as agent for the defendant.”).

164. IND. TRIAL R. 4.4(B)(2).

165. *See* IND. TRIAL R. 4.10.

166. 857 N.E.2d 433 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

limitations is tolled while a defendant is a nonresident.¹⁶⁷ The court in *Overton* affirmed the trial court's grant of summary judgment in favor of the nonresident defendant. Premised on expiration of the applicable statute of limitations, the court found that under the circumstances of the case Rule 4.10 does not violate constitutional due process, even if "actual notice" was not accomplished.¹⁶⁸

B. Service of Process: "Substantial Compliance"

In *LePore v. Norwest Bank of Indiana, N.A.*,¹⁶⁹ the court held that a plaintiff "substantially complied" with Rule 4.1(A)(3) and (B) when plaintiff left a copy of the summons and complaint at the defendant's residence, but due to an error in identifying the defendant's correct name, follow-up service by *certified mail* was returned undeliverable.¹⁷⁰ Rule 4.1(A)(3) provides for service on an individual by "leaving a copy of the summons and complaint at his dwelling house or usual place of abode."¹⁷¹ Rule 4.1(B) provides that when service is made under subsection (A)(3), "the person making service also shall send by *first class mail*, a copy of the summons without the complaint to the last known address of the person being served."¹⁷² The court explained that "even though [the plaintiff] did not technically comply with the rules [by attempting follow-up service by certified mail instead of first class mail], . . . an attempt was made to effectuate service."¹⁷³ The court concluded that the plaintiff's actions "substantially complied" with Rule 4.1(B) and "were reasonably calculated to inform [the defendant] that an action had been instituted against him."¹⁷⁴

167. *Id.* at 438.

168. *Id.* at 437-38.

169. 860 N.E.2d 632 (Ind. Ct. App. 2007).

170. *Id.* at 636.

171. *Id.* at 634 (quoting IND. TRIAL R. 4.1(A)(3)).

172. *Id.* (emphasis added) (quoting IND. TRIAL R. 4.1(B)).

173. *Id.* at 636 (distinguishing *Barrow v. Pennington*, 700 N.E.2d 477 (Ind. Ct. App. 1998), and *Swiggett Lumber Constr. Co. v. Quandt*, 806 N.E.2d 334 (Ind. Ct. App. 2004)).

174. *Id.* The court also rejected the defendant's argument that service was invalid because the certified mail attempt was returned undeliverable with a message stating "moved, left no address." *Id.* The court found that the defendant, in fact, lived at the address at which service was attempted and explained that "[a] person who has refused to accept the offer or tender of the papers being served thereafter may not challenge the service of those papers." *Id.* (alteration in original) (quoting IND. TRIAL R. 4.16(A)(2)). See also *Thomison v. IK Indy, Inc.*, 858 N.E.2d 1052, 1058-59 (Ind. Ct. App. 2006) (concluding service pursuant to Rule 4.1(A)(3) was valid despite failure to follow up with mail service, where defendant conceded that "the summons and complaint were delivered to her residence and ma[de] no argument that she did not receive the complaint" (citing *Munster v. Groce*, 829 N.E.2d 52, 63 (Ind. Ct. App. 2004) ("citing *Boczar [v. Reuben]*, 742 N.E.2d 1010 (Ind. Ct. App. 2001)) as holding . . . 'failure to follow up delivery of a complaint and summons under Trial Rule 4.1(A)(3) with mailing of a summons under Trial Rule 4.1(B) does not constitute ineffective service of process if the subject of the summons does not dispute actually having received the complaint and summons'")))).

C. Demand for Jury Trial

In *Daugherty v. Robinson Farms, Inc.*,¹⁷⁵ the court clarified an apparent conflict between Rule 6(B)—which allows the trial court discretion to grant a belated demand for a jury trial¹⁷⁶—and Rule 38(D)¹⁷⁷—which provides that once a party has failed to file a timely jury demand, the trial court may grant a jury trial only if the parties agree to it.¹⁷⁸ The court in *Daugherty* identified the potential conflict and explained its resolution as follows:

When Trial Rules 6(B) and 38(D) are read together in *pari materia*, it is clear that the trial court has discretion to allow a belated demand for a jury trial under Trial Rule 6(B) and Trial Rule 38(D). Such discretion, however, follows only if the parties have entered into a written agreement, agreeing to a trial by jury. To allow the trial court to grant a belated jury trial demand under Trial Rule 6(B), without a written agreement by the parties, would render the written agreement requirement in Trial Rule 38(D) meaningless. Furthermore, Trial Rule 38(D), as the more specific rule, takes priority over the more general Trial Rule 6(B).¹⁷⁹

The court in *Daugherty* concluded that the trial court erred when it granted the belated jury demand, because “the parties did not enter into a written agreement pursuant to Trial Rule 38(D).”¹⁸⁰

D. Compulsory Counterclaim

In *New Albany Residential, Inc. v. Hupp*,¹⁸¹ the court reversed the trial court’s dismissal of the plaintiff’s complaint, holding that the plaintiff’s claim did not constitute a compulsory counterclaim in a prior action to which the plaintiff was not a party.¹⁸² In the prior action, Hupp (now the defendant) had filed an action for breach of contract against her employer, a real estate firm, and its two shareholders.¹⁸³ However, she did not join the plaintiff in the current action as a defendant.¹⁸⁴ Several years later, the plaintiff in the current action filed an action against her for breach of the same contract.¹⁸⁵ The defendant moved for summary judgment, arguing that the plaintiff’s claim should have been asserted

175. 858 N.E.2d 192 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

176. IND. TRIAL R. 6(B).

177. IND. TRIAL R. 38(D).

178. *Daugherty*, 858 N.E.2d at 197.

179. *Id.*

180. *Id.*

181. 872 N.E.2d 627 (Ind. Ct. App. 2007).

182. *Id.* at 631.

183. *Id.* at 628.

184. *Id.*

185. *Id.*

as a compulsory counterclaim in the first lawsuit.¹⁸⁶

The *Hupp* court began its analysis with Rule 13(A), which governs compulsory counterclaims and provides, in pertinent part:

“A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.”¹⁸⁷

The court noted that, while the rule does not define “pleader,” the term has been interpreted as applying only to opposing parties.¹⁸⁸ The defendant, however, was not a party to—and did not take part in—the original action.¹⁸⁹ Consequently, the defendant could not have asserted a claim in that matter.¹⁹⁰ The court further noted that while the defendant could have been joined in the prior action, “that course of action was not required.”¹⁹¹

E. Dismissal

1. *Voluntary Dismissal*.—In *Finke v. Northern Indiana Public Service Co.*,¹⁹² the court affirmed the trial court’s refusal to permit the plaintiffs to dismiss their complaint voluntarily pursuant to Rule 41(A), where the matter had been pending for nearly two years and the parties had already participated in a preliminary injunction hearing.¹⁹³ The court held that the plaintiffs’ effort to dismiss their claim voluntarily at that juncture did not satisfy the requirements of Rule 41(A), noting that:

“The purpose of the rule pertaining to the voluntary dismissal of an action was to eliminate evils resulting from the absolute right of a plaintiff to take a voluntary nonsuit at any stage in the proceedings before the pronouncement of judgment and after the defendant had incurred substantial expense or acquired substantial rights.”¹⁹⁴

2. *Involuntary Dismissal*.—In *Olson v. Alick’s Drugs, Inc.*,¹⁹⁵ the court held that the trial court did not abuse its discretion in dismissing the plaintiff’s complaint pursuant to Rule 41(E), where the plaintiff failed to prosecute his

186. *Id.* at 628-29.

187. *Id.* at 629 (quoting IND. TRIAL R. 13(A)).

188. *Id.* at 630 (quoting *Broadhurst v. Moenning*, 633 N.E.2d 326, 333 (Ind. Ct. App. 1994)).

189. *Id.* at 631.

190. *Id.*

191. *Id.*

192. 862 N.E.2d 266 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 458 (Ind. 2007).

193. *Id.* at 272.

194. *Id.* at 270 (quoting *Rose v. Rose*, 526 N.E.2d 231, 234 (Ind. Ct. App. 1988)).

195. 863 N.E.2d 314 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 208 (Ind. 2007).

claims for over six months.¹⁹⁶ Specifically, the plaintiff filed an employment discrimination claim against the defendant, his former employer, in May 1998. The matter was still pending in June 2005, by which time four attorneys had been dismissed or had withdrawn from representing the plaintiff, and the plaintiff was proceeding pro se.¹⁹⁷ Following a period of approximately six (6) months with no apparent activity by the plaintiff, the defendant filed a motion to dismiss for failure to prosecute, which the trial court granted.¹⁹⁸

On appeal, the court explained that the purpose of Rule 41(E) is “‘to ensure that plaintiffs will diligently pursue their claims,’ and to provide ‘an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution.’”¹⁹⁹ The *Olson* court identified a number of factors the court must consider in determining whether dismissal pursuant to Rule 41(E) was a proper exercise of the trial court’s discretion.²⁰⁰ The factors identified by the court included:

(1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff’s part. The weight any particular factor has in a particular case depends on the facts of that case.²⁰¹

In affirming dismissal, the court noted that it was not persuaded that lesser sanctions would be effective and determined that the plaintiff was “undoubtedly stirred to action by the threat of a dismissal as opposed to genuine diligence.”²⁰² The court further concluded that the defendants had “undoubtedly been prejudiced as issues related to this cause of action [had] been hanging over their heads for nearly a decade.”²⁰³

196. *Id.* at 321-22.

197. *Id.* at 317-18.

198. *Id.* at 318.

199. *Id.* at 319 (quoting *Belcaster v. Miller*, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2004)).

200. *Id.* at 319-20.

201. *Id.* (citing *Office Env’t, Inc. v. Lake States Ins. Co.*, 833 N.E.2d 489, 494 (Ind. Ct. App. 2005)).

202. *Id.* at 320 (citing *Office Env’t*, 833 N.E.2d at 494).

203. *Id.* at 321.

F. Class Actions—Scope of Certification

In *7-Eleven, Inc. v. Bowens*,²⁰⁴ the Indiana Court of Appeals affirmed the trial court's class action certification where the trial court had limited the certification to issues of "liability and general causation."²⁰⁵ The court began its analysis with the applicable language of Rule 23(C)(4)(a), which "provides that when appropriate, 'an action may be brought or maintained as a class action with respect to particular issues.'"²⁰⁶ As the court observed:

"The theory of Rule 23(c)(4)(A) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member. Accordingly, even if only one common issue can be identified as appropriate for class action treatment, that is enough to justify the application of the provision as long as the other Rule 23 requirements have been met."²⁰⁷

The plaintiffs proposed that, once "general causation" had been established, there would be a number of individual trials for the affected class members.²⁰⁸ The court embraced this approach, noting that it is common in toxic tort litigation.²⁰⁹ Accordingly, the court concluded that the trial court had not abused its discretion in certifying the class to limited issues.²¹⁰

G. Discovery

1. *Duty to Supplement Responses.*—In *Hlinko v. Marlow*,²¹¹ the court held that the plaintiff did not violate its duty to supplement its discovery responses where the plaintiff did not delay in advising the defendant regarding changes in the plaintiff's expert's opinion.²¹² Following an automobile accident in which the plaintiff was injured, the plaintiff's medical expert examined her and prepared a report regarding his opinions as to the extent of the plaintiff's injuries.²¹³ Approximately three weeks before trial—and over three years after his initial examination—the plaintiff's medical expert reexamined her. In the second examination, the expert concluded that the plaintiff's condition had regressed and

204. 857 N.E.2d 382 (Ind. Ct. App. 2006).

205. *Id.* at 388-89.

206. *Id.* at 388 (citing IND. TRIAL R. 23(c)(4)).

207. *Id.* (quoting *Bank One Indianapolis, N.A. v. Norton*, 557 N.E.2d 1038, 1041 (Ind. Ct. App. 1990)).

208. *Id.*

209. *Id.* at 389.

210. *Id.*

211. 864 N.E.2d 351 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007).

212. *Id.* at 354.

213. *Id.* at 353.

that her injuries were more substantial than indicated in his earlier report.²¹⁴ Eleven days later, the expert faxed his notes to the plaintiff's attorney, who forwarded the notes to the defendant's counsel six days later.²¹⁵ On the first day of trial, the defendant moved to continue trial or, in the alternative, to bar the plaintiff's expert from testifying based on the plaintiff's failure to supplement its discovery responses. The trial court denied the defendant's motion.²¹⁶

On appeal, the court concluded that, because the discovery responses at issue pertained to the subject matter of an expert's testimony, Rule 26(E) required supplementation.²¹⁷ The court further observed that the duty to supplement is "absolute" and that the trial court has discretion to exclude the witness' testimony if a party fails to comply with its obligations under Rule 26(E).²¹⁸ However, because the plaintiff's counsel provided the supplemental information to his adversary within a week of receipt, the court held that the plaintiff did not breach her duty to supplement her discovery responses.²¹⁹

2. *Dismissal as Sanction for Discovery Violation.*—In *Brown v. Katz*,²²⁰ the court of appeals upheld the trial court's dismissal of the plaintiff's complaint as a discovery sanction, even though lesser sanctions had not been previously imposed.²²¹ The plaintiff objected to the majority of the defendant's document requests, relying on vague, blanket assertions of "insured-insurer privilege, attorney-client privilege and work product."²²² The plaintiff also refused to answer approximately ninety questions posed to him during his deposition, again asserting attorney-client privilege and work product protection.²²³ In response, the defendant filed a motion to dismiss the plaintiff's complaint pursuant to Rule 37(D).²²⁴

Following a hearing, the trial court ordered the plaintiff to supply a privilege log. However, the plaintiff failed to comply, providing what was determined to be an inadequate privilege log after the court-ordered deadline.²²⁵ The trial court gave the plaintiff another chance to provide an adequate privilege log. The plaintiff again failed to comply.²²⁶ Consequently, the trial court dismissed the plaintiff's claim.²²⁷

On appeal, the court noted that Rule 37(B)(2) permits the trial court to

214. *Id.* at 354.

215. *Id.*

216. *Id.*

217. *Id.* (citing *Everage v. N. Ind. Pub. Serv. Co.*, 825 N.E.2d 941, 951 (Ind. Ct. App. 2005)).

218. *Id.* (citing *Everage*, 828 N.E.2d at 951).

219. *Id.*

220. 868 N.E.2d 1159 (Ind. Ct. App. 2007).

221. *Id.* at 1161.

222. *Id.* at 1162.

223. *Id.* at 1163.

224. *Id.*

225. *Id.* at 1163-64.

226. *Id.* at 1164.

227. *Id.* at 1164-65.

sanction parties for failure to comply with discovery orders and the decisions regarding whether to impose a sanction and what sanction to impose are entrusted to the trial court's discretion.²²⁸ The court concluded that, in light of the plaintiff's "indolence," the trial court did not abuse its discretion in imposing discovery sanctions.²²⁹ Moreover, in affirming dismissal as the appropriate sanction, the court observed that "'Rule 37 has been substantially rewritten and no longer requires a trial court to impose a lesser sanction before dismissing an action or entering a default judgment, especially where the disobedient party has demonstrated contumacious disregard for the court's orders.'"²³⁰

3. *Preservation of Pre-Litigation Witness Testimony.*—In *United States Fidelity & Guaranty Insurance Co. v. Hartson-Kennedy Cabinet Top Co.*,²³¹ the court affirmed the trial court's order granting the appellee's petition to perpetuate the testimony of a witness pursuant to Rule 27(A).²³² In anticipation of an insurance coverage dispute, which had not yet ripened, the appellee petitioned the trial court to perpetuate the testimony of its sixty-nine-year-old accountant, who had reviewed the appellee's insurance policies and kept detailed notes of his review for over thirty years.²³³ The court granted the appellee's petition.²³⁴

On appeal, the court determined that the threshold requirement for a Rule 27(A) petition is some impediment to bringing suit.²³⁵ The court observed that the absence of such a requirement would "promote an abuse of the rule . . . [l]itigants could then use the rule as a 'fishing expedition' to discover grounds for a lawsuit, and, if found, to determine against whom the action should be initiated. These uses are not contemplated by Rule 27."²³⁶

Once the petitioner has established the existence of an impediment to bringing suit, the Rule 27(A) petition may be granted to "prevent a failure or delay of justice."²³⁷ Because it was uncertain when—or if—the appellee's coverage claim against the appellant insurer would ripen, and because the witness in question was an elderly gentleman and the exclusive source of information, the court concluded that granting the Rule 27(A) petition would prevent the failure or delay of justice and, therefore, affirmed the trial court.²³⁸

4. *Recovery of Fees Incurred Attending Rule 37 Hearing.*—In *M.S. ex rel.*

228. *Id.* at 1165.

229. *Id.* at 1169.

230. *Id.* (internal quotation marks omitted) (quoting *Benchmark at Fla., Inc. v. Star Fin. Card Servs., Inc.*, 679 N.E.2d 973, 978 (Ind. Ct. App. 1997)).

231. 857 N.E.2d 1033 (Ind. Ct. App. 2006).

232. *Id.* at 1035.

233. *Id.* at 1035-36.

234. *Id.* at 1036.

235. *Id.* at 1037.

236. *Id.* (quoting *Sowers v. Laporte Superior Court*, 577 N.E.2d 250, 253 (Ind. Ct. App. 1991)).

237. *Id.* (quoting *Sowers*, 577 N.E.2d at 252).

238. *Id.* at 1040.

Newman v. K.R.,²³⁹ the court held that a trial court has discretion to award attorney's fees incurred in attending a hearing regarding a motion for a Rule 37 protective order.²⁴⁰ Following a hearing regarding the petitioner's motion for protective order and the respondent's motion to compel discovery, the trial court granted the petitioner's motion, denied the respondent's motion, and awarded the petitioner its attorney's fees.²⁴¹

On appeal, the court first noted that the entry or denial of a protective order carries with it the presumption that the trial court will also require reimbursement of the prevailing party's reasonable expenses.²⁴² Having concluded that the respondent failed to rebut this presumption,²⁴³ the court held that, because Rule 37(A)(4) permits an award of expenses incurred in "staving off" the other party's discovery, "it logically follows" that the prevailing party should also recover for expenses incurred in preparing for and attending the expense award hearing.²⁴⁴

H. Summary Judgment

1. *Summary Judgment Denial as Interlocutory Order.*—In *Indiana Department of Transportation v. Howard*,²⁴⁵ the court dismissed an appeal for lack of jurisdiction where the appellant failed to secure certification of an interlocutory order denying summary judgment.²⁴⁶ The trial court initially granted the appellant's summary judgment motion; however, the trial court subsequently granted the appellee's motion to correct error, set aside its order granting summary judgment, and denied the appellant's motion for summary judgment.²⁴⁷ The *Howard* court noted that, because a denial of summary judgment is not a final appealable order, a party seeking review must seek an interlocutory appeal pursuant to Indiana Rule of Appellate Procedure 14(B).²⁴⁸ The appellant failed to seek certification from the trial court authorizing the appeal of the interlocutory order; therefore, the court held it lacked jurisdiction and dismissed the appeal.²⁴⁹

2. *Admissibility of Summary Judgment Evidence.*—In *Breining v. Harkness*,²⁵⁰ the court affirmed the trial court's order striking portions of the

239. 871 N.E.2d 303 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 215 (Ind. 2007).

240. *Id.* at 306, 311-12.

241. *Id.* at 309-10.

242. *Id.* at 311 (citing *Munsell v. Hambright*, 776 N.E.2d 1272, 1277 (Ind. Ct. App. 2002)).

243. *Id.* at 311-12.

244. *Id.* at 313.

245. 873 N.E.2d 72 (Ind. Ct. App. 2007), *vacated on other grounds*, 879 N.E.2d 1119 (Ind. Ct. App. 2008).

246. *Id.* at 74-75.

247. *Id.*

248. *Id.* at 75 (citing *Cardiology Assocs. of Nw. Ind., P.C. v. Collins*, 804 N.E.2d 151, 155 (Ind. Ct. App. 2004)).

249. *Id.*

250. 872 N.E.2d 155 (Ind. Ct. App. 2007).

plaintiff's affidavit in support of summary judgment, holding that "[i]nadmissible hearsay contained in an affidavit may not be considered in ruling on a summary judgment motion."²⁵¹ The plaintiff sought to oppose the defendant's summary judgment motion—directed toward the plaintiff's conversion claim—with an affidavit relating to the challenged transactions.²⁵² However, the court rejected this attempt, concluding that "[i]nasmuch as [the plaintiff] lacked personal knowledge of the transaction at issue, and attempted to introduce hearsay and legal conclusions through his affidavit, the substantive portions of his affidavit were properly stricken."²⁵³

3. *Extension of Time to Respond to Summary Judgment Motion.*—In *McGuire v. Century Surety Co.*,²⁵⁴ the court affirmed the trial court's order denying an extension of time to respond to a summary judgment motion.²⁵⁵ Appellants had filed a third-party claim against the appellee, the appellant's insurer, disputing the appellee's denial of coverage for damage sustained at the appellants' home.²⁵⁶ In response to the appellee's summary judgment motion, the appellants sought an extension of time in which to file their opposition, contending that additional time was needed (1) to consult with the trustee in a related bankruptcy proceeding and (2) because of time constraints upon the appellant's attorney, who was also representing them in the bankruptcy proceeding.²⁵⁷

The court began its analysis with a review of Rule 56(I), which provides, "For cause found, the Court may alter any time limit set forth in this rule upon motion made within the applicable time limit."²⁵⁸ The court next observed that altering time limits on summary judgment is within the trial court's discretion, and, while the trial court could have granted the appellant's motion for additional time, it was not an abuse of discretion to deny it.²⁵⁹ The appellants provided no explanation of the need to consult with the bankruptcy trustee.²⁶⁰ Further, the court noted that "a general claim of being too busy to timely respond to another party's motion does not *require* a court to grant a motion for an extension of time to file a response, although it may *permit* a trial court to grant such a motion."²⁶¹

251. *Id.* at 158 (citing *Newell v. Standard Land Corp.*, 297 N.E.2d 842, 846 (Ind. Ct. App. 1973)).

252. *Id.* at 157-58.

253. *Id.* at 158.

254. 861 N.E.2d 357 (Ind. Ct. App. 2007).

255. *Id.* at 359-60.

256. *Id.*

257. *Id.* at 360.

258. *Id.* (quoting IND. TRIAL R. 56(I)).

259. *Id.*

260. *Id.*

261. *Id.*

I. Relief from Judgment

1. “*Excusable Neglect.*”—In *Shane v. Home Depot USA, Inc.*,²⁶² the court affirmed a trial court’s order setting aside default judgment, holding that the defendant’s failure to file a timely answer to the plaintiffs’ complaint resulted from excusable neglect.²⁶³ The *Shane* court first noted that, because each case has unique facts, the trial court has broad discretion in determining whether to set aside a default judgment.²⁶⁴ Further, the court observed that, in light of the “preferred policy” to determine cases on their merits,²⁶⁵ default judgments are disfavored, and “[a]ny doubt of the propriety of a default judgment should be resolved in favor of the defaulted party.”²⁶⁶

Rule 55(C) provides that a default judgment may be set aside if the grounds articulated in Rule 60(B)—including excusable neglect²⁶⁷—are present.²⁶⁸ Noting that “[t]here are no clear standards to determine what is and is not excusable neglect,”²⁶⁹ the court opined that the determination must be based on a balancing of “the need for efficient administration of justice with the preference for deciding cases on their merits and giving a party its day in court.”²⁷⁰

In *Shane*, the defendant’s failure to file a timely answer resulted from a breakdown in communications with his insurer.²⁷¹ The defendant provided prompt notice of the plaintiff’s lawsuit; however, the insurer assigned the matter to an adjuster who had left the company.²⁷² Accordingly, the court concluded that it could not find error with the trial court’s decision to set aside the default judgment where a miscommunication within the defendant’s insurance company led to the default.²⁷³

2. “*Extraordinary Circumstances.*”—In *Brimhall v. Brewster*,²⁷⁴ the court addressed whether extraordinary circumstances existed such that the plaintiffs could be granted relief from entry of judgment pursuant to Rule 60(B)(8).²⁷⁵ The trial court had dismissed the plaintiffs’ complaint in accordance with Rule 41(E);

262. 869 N.E.2d 1232 (Ind. Ct. App. 2007).

263. *Id.* at 1236.

264. *Id.* at 1234 (citing *Anderson v. State Auto Ins. Co.*, 851 N.E.2d 368, 370 (Ind. Ct. App. 2006)).

265. *Id.* (citing *Walker v. Kelley*, 819 N.E.2d 832, 837 (Ind. Ct. App. 2004)).

266. *Id.* (citing *Coslett v. Weddle Bros. Constr. Co.*, 798 N.E.2d 859, 861 (Ind. 2003)).

267. IND. TRIAL R. 60(B)(1).

268. *Shane*, 869 N.E.2d at 1234 (citing *Flying J, Inc. v. Jeter*, 720 N.E.2d 1247, 1249 (Ind. Ct. App. 1999)).

269. *Id.* (citing *Jeter*, 720 N.E.2d at 1249).

270. *Id.* (quoting *Jeter*, 720 N.E.2d at 1249).

271. *Id.* at 1236.

272. *Id.*

273. *Id.*

274. 864 N.E.2d 1148 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007).

275. *Id.* at 1153.

however, the plaintiffs did not receive notice of the dismissal, continued to prosecute their claims against the defendant, and obtained a default judgment.²⁷⁶ Nearly a year later, the trial court sought to remedy the problem through a pair of *nunc pro tunc* orders.²⁷⁷ The court of appeals rejected this approach.²⁷⁸ Following the denial of transfer, the plaintiffs filed a motion for relief from the entry of judgment.²⁷⁹

Because more than a year had passed since the entry of judgment, relief under Rule 60(B)(1)-(4) was not available to the plaintiffs; rather, they were limited to seeking relief under Rule 60(B)(8), which required the plaintiffs to establish “exceptional circumstances justifying extraordinary relief.”²⁸⁰ Moreover, the court noted that, to meet their burden, the plaintiffs must do more than show that their failure to act was the result of “an omission involving mistake, surprise, or excusable neglect. Rather some extraordinary circumstances must be demonstrated affirmatively.”²⁸¹

The *Brewster* court concluded that the trial court had not abused its discretion in determining that the plaintiffs had demonstrated the existence of extraordinary circumstances—including the trial court’s failure to notify the plaintiffs of the dismissal and then permitting the case to proceed as if no dismissal had been entered.²⁸²

J. Motion to Correct Error

1. *Distinguished from Motion to Reconsider for Appellate Purposes.*—In *Citizens Industrial Group v. Heartland Gas Pipeline, LLC*,²⁸³ the court held that an appellant must file a notice of appeal within thirty days of an administrative agency’s order, regardless of whether the party petitions the agency to reconsider its ruling.²⁸⁴ Twenty days after an order by the Indiana Utility Regulatory Commission (“IURC”), the appellant filed a petition with the IURC for reconsideration. The IURC denied the petition fifty-seven days later.²⁸⁵ The appellant filed its notice of appeal thirty days after the IURC denied its petition for reconsideration—or 107 days after the IURC entered its order.²⁸⁶

On appeal, the court noted that, pursuant to Rule 53.4, a motion to reconsider

276. *Id.* at 1150.

277. *Id.*

278. *Id.* 1150-51; *see also* Dorelli, *supra* note 4, at 739-41 (discussing *Brimhall v. Brewster*, 835 N.E.2d 593 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1005 (Ind. 2006)).

279. *Brewster*, 864 N.E.2d at 1151.

280. *Id.* at 1153 (citing *Ind. Ins. Co. v. Ins. Co. of N. Am.*, 734 N.E.2d 276 (Ind. Ct. App. 2000)).

281. *Id.* (quoting *Ind. Ins. Co.*, 734 N.E.2d at 279-80)).

282. *Id.* at 1154.

283. 856 N.E.2d 734 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 453 (Ind. 2007).

284. *Id.* at 738.

285. *Id.* at 736.

286. *Id.*

will not toll a party's deadline to file a notice of appeal in the context of general civil litigation.²⁸⁷ However, the court determined that, in an administrative proceeding, filing a motion to reconsider or for rehearing following an entry of a final order is tantamount to filing a motion to correct errors following a court's entry of final judgment.²⁸⁸

The court then contrasted Appellate Rule 9(A)(1), which provides that a party's notice of appeal must be filed within thirty days of the date on which its motion to correct errors is denied or deemed denied, with Appellate Rule 9(A)(3), which governs appeals from agency decisions.²⁸⁹ As the court noted, Rule 9(A)(3) does not have "language regarding a petition for reconsideration, the administrative procedure's counterpart to a motion to correct error."²⁹⁰

The court suggested that "equity would seem to favor giving administrative agencies the same second chance to review their decisions as trial courts are afforded"; however, the court determined that it was "constrained by the language of the rules of appellate procedure."²⁹¹ Accordingly, the court held that, because the appellant had failed to file his notice of appeal within thirty days of the IURC order, the appellant failed to comply with Appellate Rule 9(A)(3) and dismissed the appeal.²⁹²

2. *Deemed Denial and Impact on Appeal.*—In *HomEq Servicing Corp. v. Baker*,²⁹³ the court reversed the trial court's untimely order granting a motion to correct error, which had already been deemed denied.²⁹⁴ Following the trial court's entry of summary judgment in favor of the defendant, the plaintiff filed a motion to correct error and set aside summary judgment. Thirty-eight days after the hearing on the plaintiff's motion, the trial court entered an order granting plaintiff's motion to correct error and setting aside the summary judgment order.²⁹⁵ In light of the trial court's order, the plaintiff did not file a notice of appeal.²⁹⁶

On appeal, the defendant argued that the motion to correct error had been deemed denied pursuant to Rule 53.3(A), which provides that such a motion shall be deemed denied if the trial court fails to rule on the motion within thirty days after it is heard.²⁹⁷ The *Baker* court agreed, holding that the motion to correct error was deemed denied.²⁹⁸ Further, relying on the Indiana Supreme Court's

287. *Id.* at 737.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 738.

292. *Id.*

293. 863 N.E.2d 1262 (Ind. Ct. App. 2007), *trans. granted, opinion vacated*, 883 N.E.2d 95 (Ind. 2008).

294. *Id.* at 1265.

295. *Id.* at 1263-64.

296. *Id.*

297. *Id.* at 1264.

298. *Id.* at 1265.

decision in *Cavinder Elevators, Inc. v. Hall*,²⁹⁹ the court concluded that, because the plaintiff had not filed a notice of appeal within thirty days of the date on which their motion to correct error was deemed denied, the plaintiff could not argue the merits of its motion to correct error, i.e., that summary judgment should not have been entered in favor of the defendant, on cross appeal.³⁰⁰

3. *Second Motion to Correct Error.*—In *Peters v. Perry*,³⁰¹ the court of appeals confronted the issue of whether a second motion to correct error will further toll the movant's deadline to file a notice of appeal.³⁰² Following the trial court's entry of default judgment against the defendant, who proceeded in the action pro se,³⁰³ on June 16, 2006, the defendant filed two motions to correct error—the first on June 19, 2006, and the second on July 17, 2006.³⁰⁴ The trial court denied the first motion to correct error on July 5, 2006, but did not deny the second motion until October 23, 2006.³⁰⁵ The defendant filed his notice of appeal on November 22, 2006.³⁰⁶

On appeal, the court held that, pursuant to Appellate Rule 9(A)(1), the defendant had thirty days from the denial of the *first* motion to correct error to file his notice of appeal.³⁰⁷ The defendant's November 22, 2006 notice of appeal came well after this deadline had expired.³⁰⁸

K. Arbitration

1. *Scope.*—In *Walker v. DaimlerChrysler Corp.*,³⁰⁹ in a matter of first impression, the court considered whether the Magnuson-Moss Warranty Act (“MMWA”) permits binding arbitration agreements.³¹⁰ The plaintiff filed suit against the defendant automobile manufacturer, asserting (among other things) a claim for “breach of written warranty pursuant to the MMWA.”³¹¹ Because the

299. 726 N.E.2d 285 (Ind. 2000). In *Cavinder*, the plaintiff's motion to correct error was deemed denied where the trial court failed to rule within thirty days of the hearing; however, the plaintiff filed its notice of appeal within thirty days. *Id.* at 286. Accordingly, the *Cavinder* court determined that the plaintiff had preserved its ability to argue the merits of its motion to correct error on appeal. *Id.* at 289.

300. *Baker*, 863 N.E.2d at 1265.

301. 873 N.E.2d 676 (Ind. Ct. App.), *reh'g*, 877 N.E.2d 498 (Ind. Ct. App. 2007).

302. *Id.* at 678.

303. The court noted that “‘a litigant who chooses to proceed pro se will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his action.’” *Id.* (quoting *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004)).

304. *Id.* at 677.

305. *Id.*

306. *Id.*

307. *Id.* at 679.

308. *Id.*

309. 856 N.E.2d 90 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

310. *Id.* at 93.

311. *Id.* at 92.

written warranty agreement contained an arbitration clause, the trial court granted the defendant's summary judgment motion and entered an order dismissing the plaintiff's complaint and compelling arbitration.³¹²

On appeal, the plaintiff argued that binding arbitration agreements are unenforceable under the MMWA.³¹³ Noting the presumption in favor of the enforceability of contractual arbitration provisions,³¹⁴ the court applied the test articulated by the United States Supreme Court in *McMahon* "to determine whether a specific statute allows binding arbitration."³¹⁵ Specifically, as the party opposing arbitration, the plaintiff bore the burden of establishing that Congress intended to preclude arbitration.³¹⁶ This intent would be evident from: "(1) the statute's text; (2) the statute's legislative history; or (3) an inherent conflict between arbitration and the statute's underlying purposes."³¹⁷

The *Walker* court analyzed each of the three *McMahon* factors and determined that the plaintiff directed the court to no language in the MMWA and nothing in the legislative history of the MMWA prohibiting binding arbitration.³¹⁸ Further, the plaintiff did not identify any "inherent conflict between arbitration and the MMWA's underlying purposes."³¹⁹

The court also rejected the plaintiff's argument that the Federal Trade Commission's ("FTC") interpretation of the MMWA as not permitting binding arbitration should guide the court's decision.³²⁰ In reaching this result, the court found unreasonable each of the three bases supporting the FTC's interpretation.³²¹ First, the court asserted that the MMWA's provision for a judicial forum does not, as the FTC concluded, prohibit a binding arbitration agreement.³²² Second, the court noted that the "MMWA's provision for non-binding informal dispute resolution procedures does not preclude enforcement of a mandatory binding arbitration agreement."³²³ Finally, the court rejected the FTC's concern that arbitration will not adequately protect consumers.³²⁴

Having rejected the FTC's interpretation of the MMWA as unreasonable and having determined that the plaintiff failed to carry his burden with respect to

312. *Id.*

313. *Id.* at 92-93.

314. *Id.* at 93-94 (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

315. *Id.* at 94. This is referred to as the *McMahon* Test. *Id.*

316. *Id.* (citing *McMahon*, 482 U.S. at 226).

317. *Id.* (citing *McMahon*, 482 U.S. at 227).

318. *Id.* at 95.

319. *Id.*

320. *Id.* at 97.

321. *Id.* (employing the test articulated by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). As a preliminary matter, the court noted that under *Chevron* Step 1, that Congress had not directly addressed the issue. *Id.* The court then noted that "Congress did not explicitly leave a gap for the agency to fill." *Id.*

322. *Id.* at 97-98.

323. *Id.* at 98.

324. *Id.*

demonstrating Congress' intent to prohibit arbitration, the court held that the "mandatory binding arbitration agreements are permissible under the MMWA."³²⁵

2. *Waiver*.—In *Tamko Roofing Products, Inc. v. Dilloway*,³²⁶ the court of appeals affirmed the trial court's order denying the defendant's motion to dismiss and compel arbitration, holding that the defendant had waived its right to enforce a contractual arbitration provision.³²⁷ The plaintiff brought a claim against the defendant, a manufacturer of roofing products, alleging breach of a written warranty. Because the warranty contained a binding arbitration provision, the defendant moved to dismiss the plaintiff's complaint and to compel arbitration.³²⁸ However, because the defendant waited until after the plaintiff had presented his evidence at trial before making its motion to dismiss, the trial court denied the motion and determined that the defendant had waived its right to arbitrate.³²⁹

On appeal, the court first noted that, although arbitration agreements are generally "valid and enforceable, the right to require such arbitration may be waived by the parties."³³⁰ Moreover, waiver can "be implied by the acts, omissions or conduct of the parties."³³¹ When determining whether a party has waived its right to arbitrate, the court will consider a number "of factors, including the timing of the arbitration request, if dispositive motions have been filed, and/or if a litigant is unfairly manipulating the judicial system by attempting to obtain a second bite at the apple due to an unfavorable ruling in another forum."³³²

The court concluded that, because the record indicated that the defendant took no action to compel arbitration until after the plaintiff had rested its case at trial, the defendant waived its right to arbitration.³³³

L. Attorney Fees

In *Reuille v. E.E. Brandenberger Construction, Inc.*,³³⁴ the court of appeals affirmed the trial court's denial of an award of attorney's fees, holding that Indiana does not recognize the "catalyst" theory.³³⁵ The plaintiff and defendant had entered into a contract, which included a provision whereby the "prevailing

325. *Id.* at 99.

326. 865 N.E.2d 1074 (Ind. Ct. App. 2007).

327. *Id.* at 1080.

328. *Id.* at 1076.

329. *Id.* at 1077.

330. *Id.* at 1079 (quoting *Safety Nat'l Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 1004 (Ind. Ct. App. 2005)).

331. *Id.* (citing *Safety Nat'l Cas. Co.*, 829 N.E.2d at 1004).

332. *Id.* (quoting *Safety Nat'l Cas. Co.*, 829 N.E.2d at 1004).

333. *Id.* at 1079-80.

334. 873 N.E.2d 116 (Ind. Ct. App. 2007), *trans. granted, opinion vacated*, 888 N.E.2d 770 (Ind. 2008).

335. *Id.* at 120.

party” in any action to enforce the contract would be entitled to recover attorney’s fees. The parties participated in mediation, during which they entered into a settlement upon favorable terms to the plaintiff.³³⁶ The trial court determined that the plaintiff was not a “prevailing party” under the parties’ agreement and, therefore, was not entitled to recover fees.³³⁷

On appeal, the plaintiff argued that the trial court did not interpret the term “prevailing party” correctly.³³⁸ Plaintiff contended that he was the prevailing party by virtue of the “catalyst theory,” whereby a plaintiff is considered a prevailing party if he achieves his desired result in that the “lawsuit brought about a voluntary change in the defendant’s conduct.”³³⁹ The court rejected this argument, holding that, at the time the parties executed their settlement agreement, Indiana law did not recognize the “catalyst theory.”³⁴⁰ Moreover, the court held that, “under current precedent,” to be considered a “prevailing party,” one must obtain a judgment or consent decree.³⁴¹

M. Post-Judgment Security

In *Adams ex rel. Adams v. Sand Creek, Inc.*,³⁴² an attorney who had successfully represented the plaintiff in a personal injury action appealed the trial court’s order directing him to post a bond relating to an attorney’s lien filed by his co-counsel.³⁴³ On appeal, the court held that Rule 64(A) and (B) provide the trial court with remedies to assist in securing satisfaction of judgments;³⁴⁴ however, the court determined that these rules provide remedies to “the *plaintiff* in a lawsuit filed to recover money from another party.”³⁴⁵ However, because the appellant and appellee were not parties in the lawsuit, Rule 64(A) and (B) were inapplicable, and the court reversed the trial court’s order.³⁴⁶

N. Small Claims Court

1. *Res Judicata*.—In *Moreton v. Auto-Owners Insurance*,³⁴⁷ the court affirmed the trial court’s denial of the defendant’s summary judgment motion.³⁴⁸

336. *Id.* at 117-18.

337. *Id.* at 118.

338. *Id.* at 119.

339. *Id.* at 119-20 (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 601 (2001)).

340. *Id.* at 121.

341. *Id.* at 122 (citing *Buckhannon Bd.*, 532 U.S. at 600; *Daffron v. Snyder*, 854 N.E.2d 52, 53, 56-57 (Ind. Ct. App. 2006)).

342. 860 N.E.2d 898 (Ind. Ct. App. 2007).

343. *Id.* at 899.

344. *Id.* at 902-03.

345. *Id.* at 903.

346. *Id.* at 903-04.

347. 859 N.E.2d 1252 (Ind. Ct. App. 2007).

348. *Id.* at 1255.

The plaintiff, an insurance company exercising its subrogation rights, brought a negligence action against the defendant, a contractor who had performed work on the plaintiff's insured's property.³⁴⁹ Prior to the plaintiff's action, its insured successfully prosecuted a small claims action against the defendant for the uninsured portion of the loss arising from the defendant's work.³⁵⁰ The defendant moved for summary judgment, arguing that the plaintiff's claims were barred by res judicata.³⁵¹ On appeal following the trial court's denial of the defendant's summary judgment motion, the defendant argued that res judicata barred the plaintiff from relitigating claims that were or could have been asserted in the prior small claims action.³⁵²

The *Moreton* court began its analysis with Small Claims Rule 11(F), which provides that "[a] judgment shall be res judicata only as to the amount involved in the particular action and shall not be considered an adjudication of any fact at issue in any other action or court."³⁵³ Next the court examined the four elements necessary for a judgment to have res judicata effect, namely:

- 1) the former judgment must have been rendered by a court of competent jurisdiction; 2) the matter now in issue was, or might have been, determined in the former suit; 3) the particular controversy previously adjudicated must have been between the parties to the present suit or their privies; and 4) the judgment in the former suit must have been rendered on the merits.³⁵⁴

Relying on the Indiana Supreme Court's decision in *Chemco Transport, Inc. v. Conn*,³⁵⁵ the court concluded that the plaintiff was not a party to the prior small claims action; furthermore, the plaintiff lacked control over its insured's actions in the prior action—and was apparently unaware of its insured's claim.³⁵⁶ Accordingly, the court affirmed the trial court's order denying summary judgment.³⁵⁷

2. *Corporation Representation by Counsel*.—In *Stillwell v. Deer Park*

349. *Id.* at 1253.

350. *Id.*

351. *Id.* at 1253-54.

352. *Id.* at 1253.

353. IND. SMALL CLAIMS R. 11(F).

354. *Moreton*, 859 N.E.2d at 1254 (citing *Cox v. Ind. Subcontractors Ass'n, Inc.*, 441 N.E.2d 222, 225 (Ind. Ct. App. 1982)).

355. 527 N.E.2d 179 (Ind. 1988). In *Conn*, the supreme court held that an insurer's settlement and dismissal of a subrogation claim did result in res judicata as to the insured's claim against the same defendant for the same injuries because the insurer only partially compensated its insured for the loss and because the insured was not a party to the subrogation action and had no ability to control it. *Id.*

356. *Moreton*, 859 N.E.2d at 1254-55 (noting that even though "the rules of the insurer and the insured [were] reversed . . . the *Conn* reasoning leads . . . to the same result").

357. *Id.* at 1255.

Management,³⁵⁸ the court concluded that it was error for the trial court to permit the corporate plaintiff to proceed in a small claims action unrepresented by counsel.³⁵⁹ The plaintiff-appellee, a landlord, brought an action to recover unpaid rent from the defendant-appellant, a former tenant; however, the plaintiff did not appear in the action through an attorney during the pretrial proceedings, as required by Small Claims Rule 8(C).³⁶⁰ However, the plaintiff was represented by an attorney at trial.³⁶¹ Following trial, judgment was entered in favor of the plaintiff, and the defendant appealed.³⁶²

On appeal, the court observed that the requirement that corporate parties be represented by counsel arises from the need ““to curtail unlicensed practice of law, the attendant ills of which can be exacerbated when one of the litigants is a corporation.””³⁶³ As the court continued, a corporation can only act through its agents, and “[w]hen these agents are not attorneys, a lack of legal expertise combined with a failure to maintain a proper chain of communication between the agents at each level of the action may act to frustrate the continuity, clarity and adversity which the judicial process demands.””³⁶⁴ Accordingly, the court concluded that the trial court erred by permitting the plaintiff to proceed without an attorney until trial;³⁶⁵ however, because the plaintiff was represented at trial, the trial court’s error was not reversible.³⁶⁶

III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

In September 2007, the Indiana Supreme Court ordered a number of amendments to the Indiana Rules of Trial Procedure, which became effective January 1, 2008.³⁶⁷

A. *Electronic Discovery*

The most significant amendments to the Rules relate to the discovery of electronically stored information. Specifically, Rules 26, 34, and 37 were amended to include provisions relating to electronic discovery. For example,

358. 873 N.E.2d 647 (Ind. Ct. App. 2007), *reh’g*, 877 N.E.2d 227 (Ind. Ct. App. 2008) (unpublished table decision).

359. *Id.* at 650.

360. *Id.* at 649.

361. *Id.* at 650.

362. *Id.* at 649.

363. *Id.* (quoting *Yogi Bear Membership Corp. v. Stalnaker*, 571 N.E.2d 331, 333 (Ind. Ct. App. 1991)).

364. *Id.* at 650 (alteration in original) (quoting *Stalnaker*, 571 N.E.2d at 333).

365. *Id.*

366. *Id.* at 651.

367. The most significant amendments to the Rules, effective January 1, 2008, are addressed below. For a complete description of revisions to the Rules, see the Indiana Supreme Court’s Order Amending Rules of Trial Procedure, entered September 10, 2007, which is available at <http://www.in.gov/judiciary/orders/rule-amendments/2007/trial-091007.pdf>.

Rule 26(A), which identifies permissible “methods” of discovery, was amended to include production of “electronically stored information.”³⁶⁸

Rule 34(A), governing requests for the production of documents or other materials, was amended to include “electronically stored information” among discoverable materials.³⁶⁹ Rule 34(B) was amended to provide that a request for electronically stored information “may specify the form or forms in which electronically stored information is to be produced.”³⁷⁰ Rule 34(B) was also amended to provide that a responding party may object “to the requested form or forms for producing electronically stored information” and, further, “[i]f objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use.”³⁷¹ Finally, Rule 34(B) was amended to guide a responding party when no “form” is specified in the request for production of electronically stored information:

If a request for electronically stored information does not specify the form or forms of production, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. A party need not produce the same electronically stored information in more than one form.³⁷²

Rule 26(C), governing protective orders, provides that “[u]pon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”³⁷³ Rule 26(C) proceeds to enumerate various forms of relief available via protective order.³⁷⁴ Rule 26(C)(9) was added, effective January 1, 2008, providing the following:

[A] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause.

368. IND. TRIAL R. 26(A)(3).

369. IND. TRIAL R. 34(A)(1). Rule 34(A)(1) was also amended by replacing the phrase “from which . . . intelligence can be perceived, with or without the use of detection devices” with the phrase “from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form.” *Id.*

370. IND. TRIAL R. 34(B).

371. *Id.*

372. *Id.*

373. IND. TRIAL R. 26(C).

374. IND. TRIAL R. 26(C)(1)-(9).

The court may specify conditions for the discovery.³⁷⁵

In light of the amendments specifically providing for the discovery of “electronically stored information,” Rule 37, which governs discovery sanctions, was amended to add a new subsection (E), providing: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.”³⁷⁶

B. Scope and Use of Discovery

Rule 26(B)(1) was amended to include the following:

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought or; (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(C).³⁷⁷

C. Claims of Privilege or Protection

Rule 26(B)(5) was added to affirmatively require a “privilege log” when documents are withheld based on a claim of privilege or other protection:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.³⁷⁸

Additionally, regarding inadvertently produced privileged or otherwise protected information, Rule 26(B) now provides as follows:

If information is produced in discovery that is subject to a claim or

375. IND. TRIAL R. 26(C)(9).

376. IND. TRIAL R. 37(E).

377. IND. TRIAL R. 26(B)(1).

378. IND. TRIAL R. 26(B)(5)(a).

privilege of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.³⁷⁹

379. IND. TRIAL R. 26(B)(5)(b).

INDIANA CONSTITUTIONAL DEVELOPMENTS: INCREMENTAL CHANGE

JON LARAMORE*

During the survey period, there were few truly significant developments in state constitutional law in Indiana. Instead, during the survey period, as has been true in recent years, decisions relating to individual rights under the Indiana Constitution displayed incremental adjustments rather than groundbreaking action.¹ And in one area—free expression—an Indiana Supreme Court decision may be seen as backtracking on Indiana constitutional rights first set forth more than a decade ago.

During the past several years, Indiana's courts have made several important decisions interpreting the structural portions of Indiana's Constitution—the areas governing government power, authority, and responsibility and the relationship between the branches.² During the survey period, however, there were no such significant decisions.

I. DECISIONS RELATING TO INDIVIDUAL RIGHTS

A. *Free Expression*

The Indiana Supreme Court's decision in *J.D. v. State*³ may indicate that the court is moving in a new direction regarding the free expression protections in article I, section 9 of the Indiana Constitution.⁴ The Indiana Supreme Court previously developed Indiana constitutional law on free expression in *Price v. State*,⁵ perhaps the decision with the most thorough rationale and deepest philosophical grounding in the modern era of state constitutional interpretation.⁶

J.D., a unanimous decision written by *Price* dissenter Justice Dickson, may indicate that the court is backing away from the wide berth *Price* gave to certain

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1. This Article generally analyzes decisions under the Indiana Constitution in two categories: those dealing with individual rights (the “rights constitution”) and those dealing with the structure of government (the “structural constitution”). This concept is elaborated in Jon Laramore, *Indiana Constitutional Developments*, 37 IND. L. REV. 929, 929 (2004).

2. See, e.g., *Nagy ex rel. Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 493 (Ind. 2006) (free public education); *D & M Healthcare, Inc. v. Kernan*, 800 N.E.2d 898, 900 (Ind. 2003) (governor's veto power); *Mun. City of South Bend v. Kimsey*, 781 N.E.2d 683, 697 (Ind. 2003) (special laws).

3. 859 N.E.2d 341 (Ind. 2007).

4. *Id.* at 342.

5. 622 N.E.2d 954 (Ind. 1993). The modern era in Indiana Constitutional interpretation began with the publication of Chief Justice Shepard's article, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

6. *Price*, 622 N.E.2d at 963-64.

types of expression.⁷ *Price* addressed the disorderly conduct conviction of Colleen Price, who was arrested for her loud and profane shouting at police as they arrested her friend while breaking up a New Year's Eve party.⁸ The court concluded that Price's speech was political in nature because it criticized police action, and the decision characterized political speech as a "core value" under the Indiana Constitution.⁹ It held that the State could not punish or, in the court's formulation, "materially burden" political speech unless the speech was found to result in harm "analogous to that which would sustain tort liability" to an identifiable victim.¹⁰ *Price* contains a meticulous discussion of the natural rights philosophy behind article I of the Indiana Constitution, and its holding rests on balancing the natural right of the speaker to discourse (however roughly) on political topics against the natural right of an identifiable listener not to be subjected to harm.¹¹

J.D. has several elements in common with *Price*, but its result is different. *J.D.*, a juvenile, resided at the Marion County Guardian Home.¹² *J.D.* was in a "discussion" with a Marion County deputy sheriff, who worked at the Guardian Home to maintain order.¹³ The discussion concerned *J.D.*'s difficulties with a house parent.¹⁴ The court wrote, however, that the discussion degenerated into shouting by *J.D.*, who would not allow the deputy to speak to her.¹⁵

J.D.'s version, in contrast, was that she did not raise her voice but instead only tried to explain to the deputy the problems she had with the house parent.¹⁶ (The Indiana Court of Appeals's opinion in the case stressed that some of *J.D.*'s comments were related to the conditions at the Guardian Home, including the fact that she had to keep her room door open because the room was too hot, but facility rules required the door to be closed at all times; the court of appeals concluded that *J.D.*'s comments were political in nature and therefore protected

7. *J.D.*, 859 N.E.2d at 342.

8. *Price*, 622 N.E.2d at 956-57.

9. *Id.* at 960-63.

10. *Id.* at 963-64. The court's analysis in *Price*, indicating that each portion of the Indiana Constitution is animated by a "core value," has been carried forward in only a few other decisions. The Indiana Supreme Court found a "core value" of group or corporate worship in article I in *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Department of Redevelopment*, 744 N.E.2d 443, 450 (Ind. 2001). No other "core values" have been identified, and the active, natural rights-based ethos of *Price* has shown up in few cases since.

11. *Price*, 622 N.E.2d at 958-64.

12. *J.D.*, 859 N.E.2d at 343. The Guardian Home is not a correctional facility. "The Children's Guardian Home has served the Indianapolis, Marion County areas for more than a century. Founded in 1898, the Guardian Home has traditionally offered shelter care for more than 150,000 dependent, neglected, battered and abused youngsters." Marion County Children's Guardian Home, <http://www.guardianhome.org/about.htm> (last visited Feb. 22, 2008).

13. *J.D.*, 859 N.E.2d at 343.

14. *Id.*

15. *Id.*

16. *Id.*

speech under *Price*).¹⁷ Ultimately, the deputy told J.D. that she would be arrested if she did not quiet down, but J.D. did not do so.¹⁸

J.D. was arrested and became the subject of a delinquency proceeding; the juvenile court adjudicated her delinquent for conduct that would constitute the crime of disorderly conduct, a class B misdemeanor if committed by an adult.¹⁹ On appeal, J.D. claimed that there was insufficient evidence to support her conviction because, under *Price*, her comments were protected political speech that could not support a disorderly conduct conviction.²⁰

The Indiana Supreme Court directly addressed the relationship between J.D.'s claim and *Price*, noting that *Price*'s "noisy protest about the police officer's conduct toward another person constituted political speech, that any harm suffered by others did not rise 'above the level of a fleeting annoyance,' and that . . . 'the link between her expression and any harm that was suffered' was not established."²¹ The court concluded that J.D.'s case "is distinguishable from *Price*, where the defendant's speech did not obstruct or interfere with the police."²²

In *J.D.*, in contrast, the speech "obstructed and interfered with" the deputy, and J.D.'s speech "clearly amounted to an abuse of the right to free speech and thus subjected her to accountability under Section 9."²³ The court concluded that J.D.'s speech was "not analogous to the relatively harmless speech in *Price*" and affirmed the juvenile adjudication.²⁴

The court's analysis apparently turns solely on the degree of disruption caused by the speech, whatever may be its political content. The key to *Price* appeared to be the balancing of the speaker's right to discourse on political topics against a specific listener's right to be undisturbed.²⁵ *Price*'s outcome depended, at least in part, on the fact that *Price*'s loud and profane epithets could not be said to have harmed any specific listener in the general commotion surrounding the breakup of the party and various arrests. In *J.D.*, in contrast, the identity of the listener was clear, and it was also clear that the speech had a direct and negative effect on the listener.

But *J.D.* did not analyze the content of the speech at issue. The court went directly to the conclusion that J.D.'s speech was "abuse," without reference to the content of the expression.²⁶ While section 9 protects expression "on any subject whatever," it also states that "for the abuse of that right, every person

17. *J.D. v. State*, 841 N.E.2d 204, 209 (Ind. Ct. App. 2006), *vacated*, 859 N.E.2d 341 (Ind. 2007).

18. *J.D.*, 859 N.E.2d at 343.

19. *Id.*

20. *Id.* at 344.

21. *Id.* (quoting *Price v. State*, 622 N.E.2d 954, 964 (Ind. 1993)).

22. *Id.*

23. *Id.*

24. *Id.*

25. See, e.g., *Price*, 622 N.E.2d at 963-64.

26. *J.D.*, 859 N.E.2d at 344.

shall be responsible.”²⁷ In *Price*, Justice Dickson’s dissent also concluded that the speech at issue was “abuse,” and he rejected *Price*’s elevated protection of political speech.

Absent some determination whether the speech is political and of other protected character, the section 9 right cannot be balanced against the disruption the listener experiences. The unanimous holding of *J.D.* appears to be that if the impact on the listener is sufficiently severe, the political content of the speech does not matter at all. No such analysis is explicit in *J.D.*, but it may be derived from the holding and the lack of any determination whether the speech was political or otherwise protected.

One judge of the Indiana Court of Appeals concluded that *J.D.* was inconsistent with *Price*. In *Blackman v. State*,²⁸ Judge James Kirsch concluded, in a separate concurrence, that “*J.D.* tacitly overrules *Price*,” creating “a fundamental shift in Indiana’s constitutional jurisprudence.”²⁹ He concluded that *J.D.* adopted the rationale of Justice Dickson’s *Price* dissent, that certain loud and vulgar speech is “an abuse of the right” that may be punished by the State.³⁰ Judge Kirsch wrote that “[t]here is no discussion in *J.D.* of core values or material burdens, only the conclusion that *J.D.* had abused the right of free expression.”³¹

In *Blackman*, the court of appeals also analyzed a claim that conduct supporting a disorderly conduct conviction constituted protected political speech.³² *Blackman* was sitting in a car when police arrested her brother, who was sitting next to her, on drug charges.³³ When police became suspicious of *Blackman* and asked her to get out of the car, she became “belligerent” and “loud,” repeatedly shouting profanities at the police and stating “this [is] unconstitutional.”³⁴ When police asked *Blackman* to leave, she “refused, shouting that ‘she had every right to be there, that she did not have to leave the scene.’”³⁵ She was sufficiently loud that she drew a crowd, luring people from their homes nearby.³⁶ She eventually stepped close to an officer and wagged her finger in the officer’s face.³⁷ Ultimately, *Blackman* was arrested for disorderly conduct.³⁸

The Indiana Court of Appeals concluded that *Blackman*’s speech was not

27. IND. CONST. art. I, § 9.

28. 868 N.E.2d 579 (Ind. Ct. App.) (Kirsch, J., concurring), *trans. denied*, 878 N.E.2d 211 (Ind. 2007).

29. *Id.* at 588.

30. *Id.* at 588-89.

31. *Id.* at 589.

32. *Id.* at 584 (majority decision).

33. *Id.* at 582.

34. *Id.* at 582-83.

35. *Id.* at 583.

36. *Id.*

37. *Id.*

38. *Id.*

protected under the *Price* standard.³⁹ Blackman, the court concluded, “made unreasonable noise and continued to do so after being repeatedly asked to stop.”⁴⁰ It concluded that the situation did not entitle her to raise her voice beyond reasonable levels when doing so “disrupted the officers’ investigation and attracted unwanted attention.”⁴¹

The court concluded that Blackman met the first prong of *Price*’s analysis because the State restricted her expressive activity.⁴² She could not meet the second prong, however, because her speech constituted an “abuse” that the State may restrict under section 9.⁴³ The court adopted the analysis in an earlier decision, *U.M. v. State* that expression “is political if its aim is to comment on government action,” but “where the individual’s expression focuses on the conduct of a private party, including the speaker himself, it is not political” and is therefore subject to rational review.⁴⁴ In this case, the court determined that some of Blackman’s speech was political (“this [is] unconstitutional”), but some was not (“she had every right to be there, that she did not have to leave the scene”).⁴⁵

The court concluded that her speech was disruptive and, even if it began as political, it was not political by the time she was arrested.⁴⁶ “Blackman’s speech was ultimately ambiguous as to whether she was commenting on her own conduct or that of the officers. Accordingly, we find that Blackman’s expression was not political and is therefore subject to rational review.”⁴⁷ The fact that Blackman’s conduct interfered with a police investigation clearly influenced the court’s view.⁴⁸ “Police officers conducting a legitimate investigation must be able to perform their duties without unreasonable interruption.”⁴⁹

In another post-*J.D.* case, however, the Indiana Court of Appeals required a trial court to instruct a jury on the state constitutional right to free expression as described in *Price*. In *Snell v. State*,⁵⁰ the defendant was convicted of disorderly conduct and resisting law enforcement.⁵¹ Snell was at a friend’s home when police came to arrest the friend for stealing a wallet.⁵² Snell “began to call out to the officers to stop hurting” her friend.⁵³ She “continued screaming” as he was

39. *Id.* at 588.

40. *Id.* at 584.

41. *Id.*

42. *Id.* at 585.

43. *Id.* at 584, 586.

44. *Id.* at 585 (citing *U.M. v. State*, 827 N.E.2d 1190, 1192 (Ind. Ct. App. 2005)).

45. *Id.* at 585-86.

46. *Id.* at 586.

47. *Id.* The court discussed *J.D.* at length in its opinion.

48. *Id.* at 587.

49. *Id.* at 588.

50. 866 N.E.2d 392 (Ind. Ct. App. 2007).

51. *Id.* at 394.

52. *Id.* at 394-95.

53. *Id.* at 395.

put under arrest and did not stop when police told her to do so.⁵⁴ “When Snell did not comply with the police officer’s order to be quiet and sit down, another officer placed Snell under arrest.”⁵⁵

Snell was convicted in a jury trial at which the trial judge declined her proffered instructions on speech protected by the Indiana Constitution.⁵⁶ One instruction included the constitutional text and the two-step analysis in *Price*, requiring the jury to determine (1) whether the State restricted Snell’s expressive activity and (2) whether her activity was an abuse of the right.⁵⁷ The other instruction defined expressive activity, using language from the constitution and *Price*, and defined restriction on expressive activity, also drawing on *Price*.⁵⁸ The trial court declined the instruction, at least in part because the trial court concluded that the expressive activity likely constituted an abuse under section 9.⁵⁹

Taking much of its approach from *Price*, the Indiana Court of Appeals decided that the trial court should have given the instructions because they correctly stated the law and there was evidence in the record that supported giving the instructions.⁶⁰ The court stated that “Snell’s restricted expressive activity was political in nature, as her speech was an expression of her disagreement regarding the police actions” toward her friend.⁶¹ The comments were “directed to the legality and appropriateness of police conduct. Thus, she was engaged in political expression.”⁶² The court declined the State’s invitation to conclude that Snell would have been convicted even if the instructions had been given.⁶³

A case currently under consideration by the Indiana Supreme Court may shed additional light on its view of what expression is protected by section 9. In *A.B. v. State*,⁶⁴ a trial court adjudicated a juvenile to be delinquent because of statements she posted about her middle school principal on a web page at myspace.com.⁶⁵ The postings included statements criticizing the principal’s policy prohibiting body piercings, but it also included considerable profanity and

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 396.

58. *Id.* at 397.

59. *Id.*

60. *Id.* at 397-99. The court also decided that an Allen County local rule requiring that instructions be tendered before the first day of trial impermissibly conflicted with Trial Rule 51, which allows instructions to be tendered after the close of evidence. *Id.* at 399-401. Thus, the local rule was no impediment to Snell’s proffered instructions, which were tendered after the time allowed by the local rule. *Id.*

61. *Id.* at 398.

62. *Id.*

63. *Id.* at 399.

64. 863 N.E.2d 1212 (Ind. Ct. App.), *vacated*, 878 N.E.2d 212 (Ind. 2007).

65. *Id.* at 1214.

the statement “die . . . gobert . . . die” directed at the principal.⁶⁶ The court of appeals’s opinion indicated that access to at least some portions of the web page was limited to those allowed by the web page’s owner, and the principal had to obtain assistance to get access.⁶⁷

The Indiana Court of Appeals vacated the juvenile adjudication, finding that the State restricted A.B.’s expressive rights and that her expression was not an “abuse” because “her overall message constitutes political speech. Addressing a state actor, the thrust of A.B.’s expression focuses on explicitly opposing [the principal’s] action in enforcing a certain school policy.”⁶⁸

By granting transfer, the Indiana Supreme Court vacated the court of appeals’s decision described in the preceding paragraphs.⁶⁹ The supreme court’s eventual opinion might shed further light on its view of section 9.

B. Education

The Indiana Court of Appeals examined the right to public education in *Indiana State Board of Education v. Brownsburg Community School Corp.*⁷⁰ A family that homeschooled its children sought to place their children in a small number of classes in the Brownsburg schools.⁷¹ The school corporation declined, citing its rule that students (other than special education students) could not enroll in fewer than six courses.⁷² The family appealed to the State Board of Education, which ordered Brownsburg to accept the students for the small number of classes they wanted.⁷³

On judicial review of the State Board of Education’s decision, the Indiana Court of Appeals determined that the school’s policy declining to enroll students who were homeschooled or enrolled in private schools in fewer than six classes did not violate article VIII of the Indiana Constitution.⁷⁴ The court relied in part on the “Home Rule” statute for schools, which creates a presumption in favor of a school board’s authority.⁷⁵ Moreover, the court found, the school’s policy did not violate the putative students’ right to a public education under article VIII.⁷⁶ The students could have availed themselves of a public education had they taken

66. *Id.* at 1214-15.

67. *Id.* at 1214.

68. *Id.* at 1218.

69. 878 N.E.2d 212; *see* IND. APP. R. 58.

70. 865 N.E.2d 660 (Ind. Ct. App. 2007).

71. *Id.* at 662.

72. *Id.*

73. *Id.*

74. *Id.* at 669. The provision of article VIII at issue in the case was the portion of section 1 commanding the General Assembly to set up a uniform system of common schools, “wherein tuition shall be without charge, and equally open to all.” IND. CONST. art. VIII, § 1.

75. *Brownsburg Cmty. Sch. Corp.*, 865 N.E.2d at 666 (citing IND. CODE § 20-5-1.5-1 (1989) (amended and recodified IND. CODE § 20-26-3-1 (2007))).

76. *Id.* at 668.

additional courses at Brownsburg in compliance with the school's policy.⁷⁷

C. Jury Trial

Indiana's appellate courts examined the right to jury trial in three cases during the survey period. In *Fuller v. State*,⁷⁸ the court of appeals affirmed a conviction that raised constitutional issues relating to the jury rules adopted by the Indiana Supreme Court in 2005.⁷⁹ The jury rules allow jurors to discuss a case among themselves before all evidence is in, so long as they do so as a group and reserve judgment about the outcome of the case until all the evidence is in.⁸⁰ The rules also allow jurors to ask questions, although the questions are first vetted by the trial court.⁸¹ The defendant argued that these rules denied him an impartial jury under article I, section 13 and deprived him of due process.⁸² The Indiana Court of Appeals rejected these arguments.⁸³ Fuller failed to convince the court that allowing the jurors to discuss the case before the trial was completed interfered with his right to an impartial jury.⁸⁴

In *Jackson v. State*, the Indiana Supreme Court looked at the consequences of a defendant's absence at trial.⁸⁵ Jackson appeared at pretrial proceedings both with a lawyer and after he discharged the lawyer.⁸⁶ He received in open court a court order stating his trial date.⁸⁷ He was convicted in absentia when neither he nor any lawyer appeared on that date.⁸⁸ He then moved for a new trial, indicating that his lawyer "led him to believe" there was no trial date.⁸⁹ Although the trial court denied his motion, the court of appeals vacated his conviction because it found there was no showing that Jackson knowingly waived his right to counsel.⁹⁰

The supreme court disagreed, holding that Jackson waived his right to be present at trial.⁹¹ Because he had been informed of his trial date, the court concluded that his waiver of the right to be present was knowing and voluntary, even though Jackson had made clear to the trial court at a pretrial conference that

77. *Id.*

78. 852 N.E.2d 22 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

79. *Id.* at 26.

80. *Id.* at 24 (citing IND. JURY R. 20).

81. *Id.*

82. *Id.* at 24-25.

83. *Id.* at 25.

84. *Id.*

85. 868 N.E.2d 494 (Ind. 2007).

86. *Id.* at 496.

87. *Id.*

88. *Id.* at 497.

89. *Id.*

90. *Id.*

91. *Id.* at 498.

he was having difficulty securing counsel.⁹² Although Jackson had been informed of his right to appointed counsel if he was indigent, Jackson never invoked that right.⁹³ Although Jackson was not specifically warned of the dangers of self-representation, the court found such warnings irrelevant because Jackson never indicated that he intended to represent himself at trial.⁹⁴ The Indiana Supreme Court therefore affirmed the conviction.⁹⁵

Justice Rucker dissented in *Jackson* because he believed Jackson should have been warned of the dangers of proceeding without counsel.⁹⁶ Jackson told the court he wanted to discharge counsel, and he indicated that he would hire new counsel, so he was not warned regarding self-representation.⁹⁷ Under those circumstances, Justice Rucker concluded, Jackson's waiver of his right to be present at trial could not have been knowing and voluntary.⁹⁸

The Indiana Court of Appeals also upheld an in absentia conviction in *Holtz v. State*,⁹⁹ where Holtz did not appear for trial even after he was informed of his trial date in open court.¹⁰⁰ Although the trial court told Holtz that his trial could go forward even if he did not appear, he failed to appear and he offered no explanation of his absence.¹⁰¹ Holtz's counsel did appear at trial, yet Holtz alleged ineffective assistance as a basis for reversing his conviction.¹⁰² The court found that any failure of counsel to object to evidence (the ineffectiveness that was alleged) was harmless, as the evidence that could have been objected to was cumulative.¹⁰³ The court therefore affirmed the in absentia conviction.¹⁰⁴

D. Sentencing

During the survey period, Indiana's appellate courts continued to exercise their authority under article VII, section 4 to review and revise criminal sentences.¹⁰⁵ The survey article on developments in criminal law discusses these

92. *Id.*

93. *Id.* at 499.

94. *Id.* at 500.

95. *Id.* at 501.

96. *Id.* at 501-02.

97. *Id.* at 502.

98. *Id.*

99. 858 N.E.2d 1059 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 452 (Ind. 2007).

100. *Id.* at 1060-61.

101. *Id.* at 1062.

102. *Id.* at 1063.

103. *Id.* at 1064.

104. *Id.*

105. IND. CONST. art. VII, § 4 states, in relevant part, "The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed." The Indiana Court of Appeals has the power to review and revise sentences under Indiana Appellate Rule 7.

cases at length.¹⁰⁶ This Article describes only one, the Indiana Supreme Court's opinion in *Anglemyer v. State*.¹⁰⁷ *Anglemyer* arose in the aftermath of Indiana's 2005 legislative change in sentencing procedures.¹⁰⁸ Before the legislative change, Indiana's statutes required judges to sentence within a statutory range and created a presumptive sentence for each class of crime.¹⁰⁹ A sentencing judge could issue a sentence within the range, but had to provide reasons for departing from the presumptive sentence.¹¹⁰ After the statutory change, the statutory ranges remained in effect but the presumptive terms were abolished in favor of "advisory sentences," which are the same length as the former presumptive sentences.¹¹¹ These changes responded to U.S. Supreme Court rulings indicating that presumptive-sentencing arrangements, such as Indiana's former statute, violated the Sixth Amendment because they required judges (rather than juries) to find facts that could enhance penalties.¹¹² The Indiana legislature amended the statute again in 2007, but the change was not substantive, and that amendment was not at issue in *Anglemyer*.¹¹³

In *Anglemyer*, the Indiana Supreme Court ruled that trial judges still were required to issue sentencing statements, even after presumptive sentences were abolished, to allow appellate courts to effectively exercise their responsibility to review sentences on appeal.¹¹⁴ Sentencing statements, the court said, guard against "arbitrary and capricious sentencing" and provide a "basis for appellate review" of sentences.¹¹⁵ They also assist the "defendant and the public [to] understand why a particular sentence was imposed."¹¹⁶ The court also ruled that if a sentencing statement identifies any mitigating or aggravating circumstances, it must fully identify and explain all such circumstances and explain why each is either mitigating or aggravating.¹¹⁷

E. Proportionality Clause

The survey period saw an increase in reported decisions applying the proportionality clause in article I, section 16 of the Indiana Constitution. Providing rights beyond those in the U.S. Constitution, section 16 states that in

106. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 41 IND. L. REV. 955, 960-73 (2008).

107. 868 N.E.2d 482 (Ind.), *aff'd on reh'g*, 875 N.E.2d 218 (Ind. 2007).

108. *Id.* at 484.

109. *Id.* at 485-86 (citing IND. CODE § 35-50-2-3 to -7 (West Supp. 1977)).

110. *Id.* at 486.

111. *Id.* at 487-88 (citing IND. CODE § 35-50-2-3 to -7 (Supp. 2007)).

112. *See Smylie v. State*, 823 N.E.2d 679, 682-90 (Ind. 2005) (applying *Blakely v. Washington*, 542 U.S. 296 (2004)).

113. IND. CODE § 35-50-2-3 (Supp. 2007).

114. *Anglemyer*, 868 N.E.2d at 490.

115. *Id.* at 489.

116. *Id.*

117. *Id.* at 491.

criminal matters “[a]ll penalties shall be proportioned to the nature of the offense.”¹¹⁸ In *Foreman v. State*,¹¹⁹ the defendant claimed that the penalty for the crime with which he was charged, disclosure of confidential information related to the lottery, violated the proportionality clause.¹²⁰ The lottery-related crime is a Class A felony and thus in the highest class of felonies, along with homicides and violent crimes.¹²¹ Foreman claimed that this classification was disproportionate and that his crime should be commensurate with other fraud crimes.¹²² The Indiana Court of Appeals noted that classification of crimes is primarily a legislative responsibility.¹²³

The court rejected the proportionality challenge, reasoning that the legislature could reasonably categorize the lottery-related crime as a Class A felony because it had multiple victims.¹²⁴ The crime with which Foreman was charged, disclosing secret lottery information to give a lottery player an advantage over others, undermines confidence in the lottery.¹²⁵ Revenue from the lottery goes to the teachers’ retirement fund, police and firefighter pensions, tuition support, school technology, and local construction projects.¹²⁶ All these ventures would suffer if confidence in the lottery were undermined, justifying the harsher treatment of the lottery-related fraud.¹²⁷

The court of appeals also applied the clause in *Poling v. State*,¹²⁸ in which the defendant was convicted of three counts of neglect of a dependent for severe mistreatment of her children.¹²⁹ The defendant argued that the statute was unconstitutionally vague.¹³⁰ The court determined that the provision enhancing the crime from a D to a C felony for “unusual” confinement of a child permitted a defendant to be convicted of either class of felony for the same conduct because it was impossible to determine what confinement was “unusual.”¹³¹ This problem, the court concluded, violated the proportionality clause because a defendant could be convicted of a C felony (with its longer sentence) for the same conduct that supported conviction of a D felony.¹³² The court required Poling to be resentenced for the D felony, and its opinion effectively found the

118. IND. CONST. art. I, § 16.

119. 865 N.E.2d 652 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 209 (Ind. 2007).

120. *Id.* at 653.

121. *Id.* at 655 (citing IND. CODE ANN. § 4-30-14-4 (West 2002)).

122. *Id.* at 656.

123. *Id.* at 655.

124. *Id.* at 657.

125. *Id.* at 658.

126. *Id.* at 657.

127. *Id.* at 658-59.

128. 853 N.E.2d 1270 (Ind. Ct. App. 2006).

129. *Id.* at 1272-74.

130. *Id.* at 1274.

131. *Id.* at 1276.

132. *Id.* at 1277.

C felony provision facially unconstitutional.¹³³

*F. Search and Seizure*¹³⁴

During the survey period, Indiana's appellate courts continued to adjudicate search and seizure claims under article I, section 11, which, although it contains language almost identical to the Fourth Amendment, has been interpreted to convey greater protections than the Fourth Amendment. There were no groundbreaking section 11 cases during the survey period, but the contours of section 11 continued to develop through case law.

The Indiana Supreme Court produced two noteworthy section 11 cases during the survey period. In *Grier v. State*,¹³⁵ the defendant sought to suppress evidence in the form of cocaine, which the police had preserved by applying a choke-hold on Grier when he tried to swallow it.¹³⁶ The court, in a unanimous opinion by Justice Dickson, indicated that section 11 analysis involves a balancing between individuals' privacy interests and society's interest in "safety, security, and protection."¹³⁷ The court previously explained this balancing in *Litchfield v. State*,¹³⁸ which directed lower courts applying section 11 to balance the likelihood that a violation of law had occurred against the degree of intrusion the search would impose on a citizen's ordinary activities and law enforcement's needs.¹³⁹

In this case, the court formulated a general rule that "the application of force to a detainee's throat to prevent swallowing of suspected contraband violates the

133. *Id.*

134. The Indiana appellate courts produced dozens of opinions analyzing search and seizure issues under the Indiana Constitution during the survey period, and deciding which to include in this survey is an exercise in judgment. Among those not featured in the text of this Article are *State v. Lucas*, 859 N.E.2d 1244, 1246 (Ind. Ct. App.) (affirming suppression of contents of locked box found in inventory search of automobile, under Indiana Constitution; officers should have obtained warrant to open box), *trans. denied*, 878 N.E.2d 204 (Ind. 2007); *Davis v. State*, 858 N.E.2d 168, 173 (Ind. Ct. App. 2006) (officer's investigatory stop of vehicle was unreasonable where only "suspicious" activity was that vehicle parked for several minutes at gas station that was known locus of criminal activity); *Jones v. State*, 856 N.E.2d 758, 763 (Ind. Ct. App. 2006) (inventory search in connection with impoundment of vehicle was reasonable under Indiana Constitution where leaving car on busy highway shoulder was dangerous), *trans. denied*, 869 N.E.2d 446 (Ind. 2007); and *Baird v. State*, 854 N.E.2d 398, 405 (Ind. Ct. App.) (officers' entry onto private property was reasonable under Indiana Constitution when they were investigating visible indications of an explosion and fire, and evidence of methamphetamine lab found on property did not have to be suppressed), *trans. denied*, 860 N.E.2d 597 (Ind. 2006).

135. 868 N.E.2d 443 (Ind. 2007).

136. *Id.* at 444.

137. *Id.*

138. 824 N.E.2d 356 (Ind. 2005).

139. *Id.* at 364.

constitutional prohibitions against unreasonable search and seizure.”¹⁴⁰ In such situations, police could detain the individual until the drugs passed through his system or were absorbed into his blood stream so that the evidence could be obtained in a less harmful or violent manner.¹⁴¹ The court concluded that the evidence should have been suppressed.¹⁴²

The Indiana Supreme Court’s other section 11 case was *Clarke v. State*,¹⁴³ in which the court held that a police officer who stops an individual to ask questions, and who neither implicitly nor explicitly communicates that the individual is free to go, is not required to provide advisement of rights under section 11 or the Fourth Amendment before questioning the person the officer has stopped.¹⁴⁴ In *Clarke*, an officer investigating a report of drug sales talked with Clarke, who was in a car, asking him if there was anything illegal in the car and asking for (and obtaining) his permission to search it.¹⁴⁵ The officer found marijuana and large quantities of cash during the search.¹⁴⁶ A drug-sniffing dog found cocaine in the car.¹⁴⁷

Clarke challenged the search on state and federal constitutional grounds, seeking pretrial suppression.¹⁴⁸ The Indiana Supreme Court found no Fourth Amendment violation because Clarke consented to a search and the officer neither implicitly nor explicitly indicated that Clarke was required to consent.¹⁴⁹ On the state constitutional claim, the court determined that Clarke was not in custody when he was asked for consent to search (again because the officer did not indicate to Clarke that he was required to consent).¹⁵⁰ “Clarke’s encounter with [the officer] involved neither suggestions that he should cooperate, nor the implication of adverse consequences for noncooperation, nor any suggestion that he was not free to go about his business.”¹⁵¹

Clarke (and other cases during the survey period, discussed below) implicate *Pirtle v. State*,¹⁵² the 1975 case establishing that section 11 requires a person in custody to explicitly waive the right to counsel before consent to search is valid.¹⁵³ *Pirtle* is another example of rights under the Indiana Constitution more extensive than those under the U.S. Constitution. The Indiana Supreme Court found no *Pirtle* violation in *Clarke* because Clarke had not been seized and was

140. *Grier*, 868 N.E.2d at 445.

141. *Id.*

142. *Id.*

143. 868 N.E.2d 1114 (Ind. 2007).

144. *Id.* at 1116.

145. *Id.* at 1116-17.

146. *Id.* at 1117.

147. *Id.*

148. *Id.*

149. *Id.* at 1119.

150. *Id.* at 1120.

151. *Id.*

152. 323 N.E.2d 634 (Ind. 1975).

153. *Id.* at 638.

not in custody when he was asked for consent to search the car.¹⁵⁴

Justice Rucker dissented in *Clarke*.¹⁵⁵ He concluded that Clarke was in fact seized by the officer so that Clarke had to explicitly waive the right to counsel, as *Pirtle* requires, before he could validly consent to a search.¹⁵⁶ After initially questioning Clarke, the officer did not inform him he was free to leave, and she repeated her request to search the car.¹⁵⁷ “At this point,” Justice Rucker wrote, “I am convinced that no Hoosier could reasonably assume that he or she could simply walk away.”¹⁵⁸ Justice Rucker indicated that the *Pirtle* analysis should be: “whether the person is entitled to disregard police questioning and walk away. If not, then the person must be informed of the right to consult with counsel about the possibility of consenting to a search. Otherwise no valid consent can be given.”¹⁵⁹

The Indiana Court of Appeals also looked at rights under *Pirtle* in two cases. In *Peel v. State*,¹⁶⁰ the court examined a situation in which police were called to a hotel because an odor of marijuana was emanating from a room.¹⁶¹ Police required the occupants of the room to go into a hallway; they were not arrested, but the police admitted they were not “free to wander off.”¹⁶² The occupants gave police permission to search the room, and the police found marijuana.¹⁶³ The court found the search unconstitutional and suppressed the results because police did not explicitly warn the occupants of their right to counsel before asking their permission to search.¹⁶⁴ The occupants were entitled to this warning under *Pirtle* because they were in custody.¹⁶⁵ Although neither handcuffed nor formally placed under arrest, they had admitted wrongdoing and were not free to go.¹⁶⁶ In such circumstances, the occupants were in custody and had to receive *Pirtle* warnings before being asked to consent to a search.¹⁶⁷

Similarly, in *Friend v. State*,¹⁶⁸ the court of appeals concluded that amphetamine found in an automobile search had to be suppressed for lack of *Pirtle* warnings.¹⁶⁹ Friend was stopped for speeding, and the officer found he had

154. *Clarke*, 868 N.E.2d at 1120.

155. *Id.* at 1121 (Rucker, J., dissenting).

156. *Id.* at 1122.

157. *Id.* at 1121-22.

158. *Id.* at 1122.

159. *Id.* at 1123.

160. 868 N.E.2d 569 (Ind. Ct. App. 2007).

161. *Id.* at 572.

162. *Id.* at 573.

163. *Id.*

164. *Id.* at 577. The court also addressed an issue of which occupants had authority to consent to search. *Id.* at 575-79. That issue is not relevant to the constitutional analysis.

165. *Id.* at 577-78.

166. *Id.* at 577.

167. *Id.* at 577-78.

168. 858 N.E.2d 646 (Ind. Ct. App. 2006).

169. *Id.* at 651.

no valid driver's license.¹⁷⁰ Friend was "nervous [and] agitated," so the officer handcuffed him, although the officer stated he was not under arrest.¹⁷¹ The officer asked Friend for permission to search his car, and after Friend consented the officer found the contraband.¹⁷² Because Friend was in custody, he had to be given the *Pirtle* advisement before he could validly consent to the search.¹⁷³

The Indiana Court of Appeals revisited the topic of trash searches in two cases during the survey period. The court approved trash searches in both *Washburn v. State*¹⁷⁴ and *Eshelman v. State*.¹⁷⁵ Trash searches have been litigated frequently under section 11 in the last several years and were the subject of *Litchfield v. State*, the Indiana Supreme Court case refining the standard for evaluating the reasonableness of law enforcement conduct under section 11.¹⁷⁶ In *Litchfield*, the Indiana Supreme Court ruled that trash searches ordinarily did not intrude significantly into the privacy of the person searched, usually because the person searched had already abandoned the trash to be picked up by public or private haulers.¹⁷⁷ The key issue in applying the *Litchfield* test in trash searches is therefore the degree of suspicion law enforcement officials possess that a crime has been committed and that the person at whom the search is directed was involved in the crime.¹⁷⁸

In *Washburn*, the question revolved around the reliability of a tip.¹⁷⁹ The tipster's reliability was confirmed by one officer, and another officer interviewed the tipster extensively about his background (which included several arrests and convictions) and motives.¹⁸⁰ The court of appeals ruled that the informant was sufficiently reliable to support a trash search because police had investigated his reliability and partially corroborated his statements.¹⁸¹ Similarly, in *Eshelman* the court of appeals found informants reliable enough to support the trash search.¹⁸² Two different informants reported that Eshelman was manufacturing methamphetamine, and officers personally interviewed one and determined that he had no reason to fabricate his report.¹⁸³ The mutually corroborating reports

170. *Id.* at 649.

171. *Id.*

172. *Id.*

173. *Id.* at 651.

174. *Washburn v. State*, 868 N.E.2d 594, 596 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 219 (Ind. 2007).

175. *Eshelman v. State*, 859 N.E.2d 744, 745 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 450 (Ind. 2007).

176. 824 N.E.2d 356 (Ind. 2005).

177. *Id.* at 363.

178. *Id.* at 364.

179. *Washburn*, 868 N.E.2d at 598.

180. *Id.* at 599-600.

181. *Id.* at 600.

182. *Eshelman v. State*, 859 N.E.2d 744, 748-49 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 450 (Ind. 2007).

183. *Id.*

were sufficient to support the search.¹⁸⁴

An otherwise unremarkable decision, *Meister v. State*, contains a particularly detailed application of the *Litchfield* analysis.¹⁸⁵ In *Meister*, an individual was stopped for driving without a license, and the search incident to arrest turned up a white powdery substance in a hollowed-out pen in his pocket.¹⁸⁶ This evidence led officers to search the passenger compartment of the vehicle, which turned up a pill bottle containing what later was found to be methamphetamine.¹⁸⁷ The legality of the vehicle search was litigated in the forfeiture case brought against the arrestee's mother, who owned the vehicle.¹⁸⁸ The Indiana Court of Appeals ruled that the search of the passenger compartment was reasonable under section 11.¹⁸⁹

Applying the first *Litchfield* factor, the court concluded that searching the passenger compartment was justified because police found evidence of unlawful drugs on the person of the driver when they searched him, and police therefore could associate a high likelihood of crime with the vehicle.¹⁹⁰ As to the second factor, the search was not intrusive on the owner (who was contesting the search) because she was not even present.¹⁹¹ On the third *Litchfield* factor, "extent of law enforcement needs,"¹⁹² the court stated that because the stop occurred in the evening "prompt access to a magistrate to consider issuance of a warrant may have posed some difficulty."¹⁹³ The court balanced these factors to conclude that the search was reasonable.¹⁹⁴

In *T.S. v. State*,¹⁹⁵ the Indiana Court of Appeals applied section 11 to a seizure of a student in high school.¹⁹⁶ A school police officer received an anonymous report that T.S. had marijuana in his pants pocket.¹⁹⁷ The officer removed T.S. from his gym class and required him to put on his street clothes.¹⁹⁸ When the officer asked T.S. if he had anything he should not have, T.S. removed a bag of marijuana from his pocket; the officer then reached into the pocket and found more marijuana.¹⁹⁹ In a lengthy opinion by Judge Robb, the court of

184. *Id.* at 749.

185. 864 N.E.2d 1137 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 214 (Ind. 2007).

186. *Id.* at 1139-40.

187. *Id.* at 1140.

188. *Id.* at 1140-41.

189. *Id.* at 1146.

190. *Id.* at 1145.

191. *Id.*

192. *Id.* (quoting *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005)).

193. *Id.*

194. *Id.* at 1146.

195. 863 N.E.2d 362 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 461 (Ind. 2007).

196. *Id.* at 365.

197. *Id.* at 366.

198. *Id.*

199. *Id.* T.S.'s somewhat different account was that the officer removed his pants from his gym locker and went through the pockets, finding the marijuana. *Id.* This factual difference

appeals first ruled that the seizure of the student was reasonable under the Fourth Amendment, primarily because of the student's reduced expectation of privacy in the school setting and the officer's expressed intent only to take the student to the dean's office (although the officer in fact took the student to the police station).²⁰⁰

The court's brief Indiana constitutional analysis also concluded that the officer's actions were reasonable. The court stated that there was no indication that the tip on which the officer acted was reliable and that the officer made no effort to corroborate it.²⁰¹ But "what makes [the officer's] actions reasonable is not the reliability of the information that caused him to act, but the school setting in which he acted."²⁰² The court indicated that the student's lowered privacy interest in the school setting, balanced against "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds,"²⁰³ justified the seizure and search.

In contrast, the court of appeals invalidated a pretextual traffic stop search and excluded evidence because police went too far in *Turner v. State*.²⁰⁴ Police suspected Turner in some burglaries, and an officer followed him one day in hopes of being able to stop him for a violation.²⁰⁵ The officer stopped him for speeding, but did not ticket him.²⁰⁶ The officer then told Turner he was free to leave, but also asked Turner if he would talk about the burglaries.²⁰⁷ During that conversation, Turner denied knowledge of the burglaries.²⁰⁸ The officer then questioned Turner's passenger, who said that Turner kept two guns in his apartment (apparently illegally because of Turner's prior record).²⁰⁹ This exchange caused Turner to change his mind, and Turner confessed to some of the burglaries.²¹⁰

The court of appeals, however, found that the traffic stop violated Turner's rights because the officer who stopped Turner for speeding could not testify to Turner's exact speed or to the speed limit in the area where Turner was stopped.²¹¹ "[T]he stop was not reasonable in light of that and the other circumstances."²¹² The other circumstances included the admittedly pretextual nature of the stop and the fact that an officer was following Turner, waiting for

probably leads to no different legal conclusion.

200. *Id.* at 377-78.

201. *Id.* at 378.

202. *Id.*

203. *Id.* at 379 (quoting *Myers v. State*, 839 N.E.2d 1154, 1159 (Ind. 2005)).

204. 862 N.E.2d 695, 697 (Ind. Ct. App. 2007).

205. *Id.* at 698.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 700.

212. *Id.*

him to violate a traffic law.²¹³ The court ruled that the evidence arising from the traffic stop, including Turner's confession, had to be suppressed.²¹⁴

G. Double Jeopardy

Decisions during the survey period continued to apply Indiana's different standard for evaluating one type of double jeopardy—"multiple punishments" double jeopardy arising from a single incident. Indiana's standard, based on article I, section 14, is that two convictions violate this aspect of the guarantee against double jeopardy if there is a reasonable possibility that the facts used by the jury to establish the essential elements of one offense were also used to establish the essential elements of a second offense.²¹⁵

The Indiana Supreme Court reaffirmed this analysis in *Bradley v. State*, in which the court of appeals had misapplied the standard.²¹⁶ Bradley was charged with several crimes. He was charged with criminal confinement as a Class B felony for confining an individual by use of a hammer that he used to inflict injury on his victim; he also was charged with aggravated battery as a Class B felony for inflicting serious injury on his victim with the hammer and a knife.²¹⁷ He was convicted of both charges.²¹⁸ After examining the charges and jury instructions, the Indiana Supreme Court concluded that it was reasonably possible that the jury used the same evidence—the victim's hammer-inflicted head wound—to convict Bradley of both offenses.²¹⁹ This reasonable possibility leads to the conclusion that the two convictions violate the double jeopardy clause because the jury might have used the same evidence to convict the defendant of two different crimes, and the result is that the battery conviction must be decreased to a D felony, the elements of which were supported without the duplicative evidence.²²⁰

The Indiana Supreme Court and Indiana Court of Appeals applied this analysis in several other cases during the survey year.²²¹ During the survey

213. *Id.*

214. *Id.* at 701-02.

215. *See* Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999).

216. 867 N.E.2d 1282 (Ind. 2007). The court of appeals misapplied the standard by focusing on whether there was a reasonable possibility that the jury focused on different evidentiary facts to convict the defendant of each crime; the proper focus is whether there is a reasonable possibility that the jury used *the same* evidentiary facts to convict the defendant of each crime.

217. *Id.* at 1284.

218. *Id.* at 1283.

219. *Id.* at 1285.

220. *Id.* at 1285-86.

221. *See, e.g.,* Strong v. State, 870 N.E.2d 442, 443 (Ind. 2007) (vacating enhancement to one conviction because enhancement was based on the same conduct that was the subject of a separate conviction); Scott v. State, 859 N.E.2d 749, 753-54 (Ind. Ct. App. 2007) (rejecting double jeopardy claim because conviction for resisting law enforcement was based on defendant's flight while conviction for attempted battery by use of a deadly weapon was based on separate conduct after

period, the court of appeals also found a double jeopardy violation sufficient to support vacating a conviction on application for post-conviction relief.²²² To do so, not only must the court find that the constitutional violation existed, but also that it was sufficiently obvious that trial counsel and appellate counsel were ineffective in failing to raise it. In other words, “the double jeopardy issue [was] significant and obvious from the face of the record and [was] clearly stronger than the issues raised by [the defendant]’s appellate counsel.”²²³ That Indiana’s unique double jeopardy law may support post-conviction relief indicates the appellate courts’ view that Indiana double jeopardy analysis is settled law that should be familiar to and used by all criminal defense counsel.

In another example, the court of appeals rejected a double jeopardy challenge in *McElroy v. State*,²²⁴ in which the defendant was convicted of operating a vehicle with a 0.10 blood alcohol content causing death and also of failure to stop after an accident causing death.²²⁵ The court concluded that these convictions were based on two separate acts (and therefore were not proved by the same evidence) because operating the vehicle to cause death was a different act than fleeing the scene after causing death.²²⁶

While the same evidence (the victim’s death) was used to enhance each conviction, the court did not remove the enhancement from either conviction because the enhancement for the failure to stop offense was not based on the defendant’s conduct.²²⁷ Rather, it was based on the circumstance of the prior accident and “represent[ed] a policy decision by our legislature that failing to stop after an accident resulting in death is itself a very serious crime completely separate from whether the defendant caused the victim’s death.”²²⁸ This approach appears to be in tension with Justice Sullivan’s statement in *Richardson v. State*, which indicated that Indiana’s double jeopardy principles are violated when a person is convicted and punished “for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished.”²²⁹ Justice Sullivan’s taxonomy of double jeopardy categories has been widely accepted and applied,

defendant reached his home); *Richardson v. State*, 856 N.E.2d 1222, 1230 (Ind. Ct. App. 2006) (vacating conviction for possessing methamphetamine because it was a lesser included offense of dealing in methamphetamine, of which defendant also was convicted), *trans. denied*, 869 N.E.2d 448 (Ind. 2007); *Scott v. State*, 855 N.E.2d 1068, 1074 (Ind. Ct. App. 2006) (vacating enhancement of one conviction because it was based on the same conduct that was used to enhance another conviction).

222. *McCann v. State*, 854 N.E.2d 905, 915 (Ind. Ct. App. 2006), *habeas corpus dismissed*, *McLann v. Buss*, No. 1:07-cv-175-SEB-TAB, 2007 WL 1724905 (S.D. Ind. June 12, 2007).

223. *Id.*

224. 864 N.E.2d 392 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 204 (Ind. 2007).

225. *Id.* at 394.

226. *Id.* at 398.

227. *Id.*

228. *Id.*

229. *Richardson v. State*, 717 N.E.2d 32, 56 (Ind. 1999) (Sullivan, J., concurring).

and *McElroy* is one of the few cases to depart from its analysis by allowing two convictions to be enhanced by the same harm.²³⁰

In an additional example, *Rutherford v. State*,²³¹ the court of appeals further illustrated the analysis of double jeopardy claims. Rutherford had been convicted of attempted battery and criminal recklessness arising from an incident in which he fired shots at a car.²³² The court pointed out that the charging informations overlapped, as firing a gun into an occupied vehicle was stated as the basis for both charges.²³³ While the State showed that there were two different spates of shooting, which might have supported two different convictions, the court concluded that the State did not separate the acts in its arguments to the jury.²³⁴ Looking at the charges, the evidence, and the State's arguments, the court concluded that the jury reasonably could have used the same conduct to convict Rutherford of both offenses, so it ordered the lesser conviction vacated as a double jeopardy violation.²³⁵ *Rutherford* is one of several recent cases in which appellate courts have attempted to instruct prosecutors how to plead and prove cases to avoid problems under Indiana's double jeopardy analysis.²³⁶

H. Due Course of Law

In *Israel v. Indiana Department of Correction*,²³⁷ the Indiana Supreme Court ruled 3-2 that there could be no judicial review of an administrative decision by prison officials to take \$2800 from a prisoner's trust account.²³⁸ The money was taken to satisfy an order, imposed in a prison disciplinary proceeding, that Israel pay \$8363 to a prison guard he had wounded in a knife attack.²³⁹ Israel received the \$2800 in settlement of an unrelated class action lawsuit.²⁴⁰

The supreme court ruled, in a decision by Justice Sullivan, that the trial court lacked subject matter jurisdiction because Israel's claim arose from a prison disciplinary matter. "Restitution here was a prison disciplinary sanction. It was 'agency action related to an offender within the jurisdiction of the department of correction' and, as such, not subject to judicial review" under prior precedent, *Blanck v. Indiana Department of Correction*.²⁴¹

230. See *McElroy*, 864 N.E.2d at 398. For a case relying heavily on Justice Sullivan's concurrence, see *Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002).

231. 866 N.E.2d 867 (Ind. Ct. App. 2007).

232. *Id.* at 870; see also *Stewart v. State*, 866 N.E.2d 858 (Ind. Ct. App. 2007).

233. *Rutherford*, 866 N.E.2d at 872.

234. *Id.*

235. *Id.*

236. See, e.g., *Ransom v. State*, 850 N.E.2d 491 (Ind. Ct. App. 2006).

237. 868 N.E.2d 1123 (Ind. 2007).

238. *Id.* at 1124.

239. *Id.*

240. *Id.*

241. *Id.* (quoting *Blanck v. Ind. Dep't of Corr.*, 829 N.E.2d 505, 510 (Ind. 2005)).

Justice Boehm dissented, and Justice Dickson joined his opinion.²⁴² Justice Boehm did not quarrel with *Blanck* but indicated that *Blanck* did not govern this case.²⁴³ *Blanck*, he indicated, was based in part on statutory exclusion of prison disciplinary proceedings from judicial review under the Administrative Orders and Procedures Act, and *Blanck* held that there was no subject matter jurisdiction of prison disciplinary decisions.²⁴⁴ *Israel*, Justice Boehm wrote, improperly expands the statutory exception to “any claim tangentially related to prisoner discipline.”²⁴⁵

Justice Boehm indicated that Israel’s claim was for breach of contract—he claimed that he had an agreement that his prisoner trust account could not be tapped as it was in this case.²⁴⁶ Justice Boehm indicated that this claim “may have no merit,” but it was within the court’s jurisdiction.²⁴⁷ “There is no doubt that a common law breach of contract claim is within the jurisdiction of Indiana state courts.”²⁴⁸ He argued that the majority erred in expanding the lack of jurisdiction to any claim by a prisoner that is even tenuously related to discipline.²⁴⁹

The Indiana Court of Appeals’s decision in *Anderson v. Eliot*²⁵⁰ reaffirms the principle that the due course of law clause in article I, section 12 mandates judicial review of all administrative decisions, at least outside the prison disciplinary context.²⁵¹ In this case, an officer appealed the decision of the Marion County Sheriff’s Pension Board that he was not entitled to line-of-duty

242. *Id.* (Boehm, J., dissenting). Justice Rucker concurred, noting that he had dissented from *Blanck*, believing it to be an incorrect decision. *Id.* (Rucker, J., concurring). “But *Blanck*, and the authority on which it rests, is now settled law, namely: the enforcement of prison disciplinary sanctions are not subject to judicial review.” *Id.*

243. *Id.* at 1125 (Boehm, J., dissenting).

244. *Id.* at 1126.

245. *Id.* at 1125.

246. *Id.* at 1126.

247. *Id.*

248. *Id.*

249. *Id.*

250. 868 N.E.2d 23 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007). Neither *Blanck* nor any other authority on the subject explains why the due course of law clause extends to all administrative decisions except those of the Department of Correction as they apply to prisoners. *Blanck* relied in part on a statute excluding prison disciplinary proceedings from review under the Indiana Administrative Orders and Procedures Act. *Blanck v. Ind. Dep’t of Corr.*, 829 N.E.2d 505, 510 (Ind. 2005) (citing IND. CODE § 4-21.5-2-5(6) (2004)). But other administrative decisions excluded from AOPA review have been found subject to judicial review even when there is no adequate statutory mechanism provided for judicial review. *See, e.g., Bd. of Sch. Trs. of Muncie Cmty. Schs. v. Barnell ex rel. Duncan*, 678 N.E.2d 799, 802 (Ind. Ct. App. 1997) (“It was settled long ago that in Indiana there is a constitutional right to judicial review of an administrative decision.”); *Mann v. City of Terre Haute*, 163 N.E.2d 577, 579-80 (Ind. 1960).

251. *Anderson*, 868 N.E.2d at 30.

disability benefits.²⁵² The relevant statute conferred the decision on the board alone, with no provision for judicial review, and the Pension Board argued that the trial court therefore lacked subject matter jurisdiction.²⁵³

The Indiana Court of Appeals ruled that the “open courts” language in section 12 conveys subject matter jurisdiction on the Judicial Department to review the board’s decision.²⁵⁴ The court of appeals then reversed the trial court’s determination that the disability occurred in the line of duty, ruling instead that the Pension Board’s denial of the line-of-duty pension was supported by substantial evidence.²⁵⁵

In another prisoner case, *Smith v. Indiana Department of Correction*,²⁵⁶ the Indiana Court of Appeals ruled that Indiana’s statute precluding prisoners from filing new lawsuits once three of their previous lawsuits have been dismissed does not violate article I, sections 12 or 23.²⁵⁷ Smith’s lawsuit at issue in this appeal sought \$300,000 in damages against prison personnel who had used chemical spray and force to extract him from his cell.²⁵⁸ The trial court granted a motion to dismiss under Indiana Code section 34-58-2-1 and Indiana Code section 34-58-1-2, which states that a prisoner may not file a new complaint once three of the prisoner’s prior complaints have been dismissed unless the prisoner alleges that he or she is in immediate danger of serious bodily injury.²⁵⁹

The court of appeals, in a decision by Judge Vaidik, noted that the statute at issue was one of several enacted in 2004 as a “direct response to the prolific offender litigation that has been occurring in our state courts.”²⁶⁰ The court recited facts indicating that at least three of Smith’s prior cases had been dismissed.²⁶¹ The court also noted that the statute requires courts to determine *sua sponte* whether a prisoner-plaintiff has the requisite number of previously dismissed cases—before any defendant even becomes involved in the case.²⁶²

The court concluded that the statute does not violate the open courts clause in section 12. Drawing from the Indiana Supreme Court’s decision in *Martin v. Richey*, the court recited that “there is a right of access to the courts and that the legislature cannot unreasonably deny citizens the right to exercise this right.”²⁶³ Indiana courts previously have held that prisoners have a right to bring and participate in civil litigation under article I, section 12.²⁶⁴ But, the court said,

252. *Id.* at 25.

253. *Id.* at 29-30.

254. *Id.* at 30.

255. *Id.* at 31.

256. 853 N.E.2d 127 (Ind. Ct. App. 2006).

257. *Id.* at 134-36.

258. *Id.* at 129.

259. *Id.* at 130.

260. *Id.* at 130 n.3 (citing by name several prisoners who are notorious repeat litigators).

261. *Id.* at 131.

262. *Id.* at 132.

263. *Id.* at 133 (citing *Martin v. Richey*, 711 N.E.2d 1273, 1283 (Ind. 1999)).

264. *Id.* (citing *Murfitt v. Murfitt*, 809 N.E.2d 332 (Ind. Ct. App. 2004)).

those cases do not dispose of Smith's claim.

The statute, the court reasoned, "does not abrogate the right of a prisoner to bring a civil action; rather, it acts as a limiting device."²⁶⁵ As the court wrote, "[a]n offender can bring as many civil actions as he wants, as long as three actions or claims have not been dismissed as being frivolous" or under the other statutory grounds.²⁶⁶ The court analogized the statute limiting prisoner litigation to statutes of limitations, which are limits on bringing civil litigation that do not (in most cases) violate the constitution.²⁶⁷ The court therefore rejected Smith's facial and as-applied challenges to the statute, potentially leaving the door open for as-applied challenges on other facts.²⁶⁸

The court also rejected Smith's equal privileges and immunities clause challenge to the statute because Smith did not negate every reasonable basis for the classification embodied in the statute.²⁶⁹ It was reasonable for the General Assembly to enact this statute addressing only prisoners' claims because incarceration restricts prisoners' rights; because "it [has been] widely recognized that our legal system has been inundated with civil actions filed by offenders, many of which have been found to be frivolous or meritless"; and because the state has a legitimate interest in preserving valuable judicial resources.²⁷⁰ The court ruled that the statute represents a reasonable balance of prisoners' rights to litigate against the interests in restricting frivolous litigation.²⁷¹

The Indiana Court of Appeals also rejected an open courts clause challenge to the Qualified Settlement Offer statute, Indiana Code section 34-50-1-6, in *Hanninen v. Koch*.²⁷² The statute requires a trial court to award attorneys' fees, costs, and expenses (capped at \$1000) to a litigant who makes a qualified settlement offer if the party receiving the offer does not accept it and the final judgment is less favorable than the terms of the offer.²⁷³

Hanninen argued that this statute violated the open courts clause by putting a price on choosing to take a claim to judgment rather than accepting settlement.²⁷⁴ The court of appeals disagreed, concluding that the statute did not impede parties' access to courts.²⁷⁵ The statute only gave parties incentives to look closely at legitimate settlement offers, but it prevented no one from

265. *Id.* at 134.

266. *Id.*

267. *Id.* But see *Martin v. Richey*, 711 N.E.2d 1273, 1282, 1284-85 (Ind. 1999) (finding statute of limitations unconstitutional as applied under article I, sections 12 and 23).

268. *Smith*, 853 N.E.2d at 135. Another panel of the court of appeals reached the same outcome in a similar case, rejecting a section 12 challenge. *Higgason v. Ind. Dep't of Corr.*, 864 N.E.2d 1133, 1136 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 223 (Ind. 2007).

269. *Smith*, 853 N.E.2d at 135.

270. *Id.* at 136.

271. *Id.*

272. 868 N.E.2d 1137 (Ind. Ct. App. 2007).

273. IND. CODE § 34-50-1-6(a) (2004).

274. *Hanninen*, 868 N.E.2d at 1139.

275. *Id.*

obtaining a judicial decision.²⁷⁶

The court also analyzed the statute under the equal privileges and immunities clause in article I, section 23.²⁷⁷ Hanninen argued that the Qualified Settlement Offer statute treated tort litigants differently than other litigants, violating section 23.²⁷⁸ The Indiana Court of Appeals also rejected this challenge, reasoning that there are differences between tort litigants and other litigants that justify the different treatment.²⁷⁹ For example, parties to a contract can agree to allocate attorneys' fees in the event of a dispute, but tort litigants cannot.²⁸⁰

I. Equal Privileges and Immunities

As in recent years, Indiana's courts entertained several claims that statutes violated the equal privileges and immunities clause of article I, section 23, but found no violations.²⁸¹ The decisions during the survey period continued that trend. First, to satisfy the standard in section 23, "the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated."²⁸² As one recent Indiana Court of Appeals decision put it, as a practical matter "statutes will survive [a]rticle 1, [section] 23 scrutiny if they pass the most basic rational relationship test."²⁸³

In *Giles v. Brown County ex rel. Board of Commissioners*,²⁸⁴ the Indiana Supreme Court rejected an equal privileges and immunities challenge to the statutory immunity from tort claims that arose from the operation and use of enhanced emergency communications systems.²⁸⁵ Emergency response systems are described as "enhanced" when they automatically provide emergency responders with information about and a map of the caller's location.²⁸⁶ When the Giles family invoked an enhanced emergency communications system to call an ambulance, the response took forty-five minutes. The patient died shortly after the ambulance arrived.²⁸⁷ The court found that it was reasonable for the General Assembly to immunize torts arising from the operation of enhanced emergency response systems (as compared to other emergency systems) to

276. *Id.* at 1139-40.

277. *Id.*

278. *Id.* at 1140.

279. *Id.*

280. *Id.*

281. Some claims under section 23 are treated in connection with cases decided under the open courts and due course of law provisions of IND. CONST. art. I, § 12. See *supra* Part I.H.

282. *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994).

283. *Morrison v. Sadler*, 821 N.E.2d 15, 22 (Ind. Ct. App. 2005) (plurality).

284. 868 N.E.2d 478 (Ind. 2007).

285. *Id.* at 481-82.

286. *Id.* at 481.

287. *Id.* at 479.

further the legislative goal of encouraging development of enhanced emergency technology.²⁸⁸

The Indiana Court of Appeals also rejected a section 23 challenge brought by a convicted person, who argued that a county's failure to establish a forensic diversion program caused him to be treated differently than he would have been treated had he been convicted of operating while intoxicated in a county that had a forensic diversion program.²⁸⁹ Forensic diversion programs, authorized by statute, provide treatment for individuals with alcohol addiction and, if successfully completed, may lead to treatment without entry of a judgment of conviction.²⁹⁰ Only five counties in Indiana had established these programs.²⁹¹ The court ruled that this situation did not violate section 23 because the General Assembly did not create any classifications subject to the equal privileges and immunities clause.²⁹² Rather, the legislature gave counties an option to establish a program, and only some counties accepted the invitation: "committing a crime in a smaller county or one with limited financial resources as compared to committing a crime in a large or resource-rich county is not a classification for privileges and immunities purposes."²⁹³

Also in the criminal law context, the court of appeals upheld the statute increasing punishment for persons twenty-one or older operating a vehicle with Schedule I or II controlled substances in their blood.²⁹⁴ Those under twenty-one received lesser punishment for the same crime. The State defended the classification with the argument that those older than twenty-one "are more mature than those under twenty-one and should therefore be more accountable for their actions," using the example that only those twenty-one or older are permitted to consume alcohol legally.²⁹⁵ The court adopted this justification, concluding that persons twenty-one or older may be "held to a higher standard when it comes to operating a motor vehicle."²⁹⁶

The court of appeals additionally rejected a section 23 challenge to a city ordinance allowing higher storm water fees for larger commercial locations than for smaller commercial properties.²⁹⁷ The court concluded that the size of the

288. *Id.* at 481-82. Justice Dickson dissented. *Id.* at 482 (Dickson, J., dissenting). His position was that the Giles' claim did not fall within the text of the statutory immunity because it did not result from the "operation of" the system, but rather from a separate decision not to send a particular ambulance to the Giles' residence. *Id.* at 482.

289. *Lomont v. State*, 852 N.E.2d 1002, 1006 (Ind. Ct. App. 2006).

290. *Id.* at 1004 n.4 (quoting IND. CODE § 11-12-3.7-11(b) (Supp. 2007)).

291. *Id.* at 1004.

292. *Id.* at 1008.

293. *Id.*

294. *Rowe v. State*, 867 N.E.2d 262, 268 (Ind. Ct. App. 2007). The court considered the constitutional challenge despite finding that Rowe waived the claim on appeal by failing to first raise the issue in the trial court. *Id.* at 267.

295. *Id.* at 267-68.

296. *Id.* at 268.

297. *Brockmann Enters., LLC v. City of New Haven*, 868 N.E.2d 1130, 1135 (Ind. Ct. App.),

property was an “inherent” characteristic for section 23 purposes and “[t]he City could reasonably have concluded that the cost of providing service to a large commercial location would vary from the cost of serving smaller commercial sites.”²⁹⁸ The court also rejected a section 23 challenge to the Child Wrongful Death statute, in which plaintiffs argued that the statute’s provision for damages for the death of a child should be extended to cover the death of a viable fetus.²⁹⁹ The court concluded that the different treatment was based on inherent differences between living children and viable fetuses, including the existence of the child independent of the mother, and that the different statutory treatment was “reasonably related” to the inherent differences.³⁰⁰

II. DECISIONS RELATING TO GOVERNMENTAL STRUCTURE AND POWERS

Indiana’s appellate courts decided a small number of cases relating to government structure and powers during the survey period.

A. *Distribution of Powers*³⁰¹

The Indiana Court of Appeals used distribution of powers principles to act on an election case originating in Martin County, *Nolan v. Taylor*.³⁰² When the Martin County Clerk resigned, the chair of the clerk’s political party called a caucus of precinct committee chairs and vice-chairs to select a replacement.³⁰³ The caucus was governed by statute and by rules promulgated by the Indiana Democratic Party.³⁰⁴

The caucus vote resulted in a tie, which the county chair broke by voting a second time, as state statute provided, resulting in the selection of John Hunt.³⁰⁵ Nolan, the loser of the tiebreaker, filed a petition to challenge the caucus results.³⁰⁶ The trial court rejected the challenge and affirmed Hunt’s election.³⁰⁷

The court of appeals decided that the trial court lacked subject matter jurisdiction because the dispute was political, outside the purview of the Judicial Department.³⁰⁸ In a unanimous opinion by Judge Robb, the court ruled that the dispute was “purely political,” and “absent statutory authority, the courts are

trans. denied, 878 N.E.2d 215 (Ind. 2007).

298. *Id.* at 1134.

299. *McVey v. Sargent*, 855 N.E.2d 324, 328 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 447 (Ind. 2007).

300. *Id.* at 327.

301. Article III of the Indiana Constitution is entitled “Distribution of Powers.” This phrase equates to the “separation of powers” concept discussed in federal constitutional law.

302. 864 N.E.2d 419 (Ind. Ct. App. 2007).

303. *Id.* at 420.

304. *Id.*

305. *Id.* at 421 (citing IND. CODE § 3-13-11-8 (2005)).

306. *Id.*

307. *Id.* at 424.

308. *Id.*

without the power to issue injunctions or restraining orders or to otherwise interfere with the results of a caucus.”³⁰⁹ The court pointed out that no statute provides judicial review of the results of a caucus.³¹⁰

The caucus is not an election, but rather a process for appointing a temporary successor to the elected officeholder—a process ceded by statute to a political party rather than to voters.³¹¹ The court stated that there should not be judicial review (absent statutory command) of whether a political party complied with its own rules.³¹² “Although statutory rules govern the caucus procedure, it is still the province of the political party to ensure enforcement of those rules, and courts will not interfere by way of injunction or restraining order absent specific statutory authority.”³¹³ The court stated that party rules provide a procedure for remedying problems such as those Nolan raised.³¹⁴

Distribution of powers principles animate this decision. The Judicial Department declined to intervene in a political controversy, which implicated statutory law but was at heart a dispute about whether a political party properly applied the statutes and internal party rules governing appointment of a temporary county clerk.³¹⁵ The court held that, unless the General Assembly explicitly provided that the judiciary had a role in settling this kind of dispute, the dispute had to be handled within the political party structure because it was otherwise outside the purview of the judicial branch.³¹⁶

The Indiana Court of Appeals also looked at distribution of powers issues in *Combs v. Daniels*, a case arising from the closure of a state facility for disabled children.³¹⁷ After state officials in the Executive Department chose to close the Silvercrest Children’s Developmental Center, children residing there and employees working there brought suit, arguing that the state officials lacked authority to close the center.³¹⁸ The state officials argued that the center no longer provided appropriate treatment and that the population cared for at the center would receive better (and less expensive) care in community placements, often nearer to the children’s homes.³¹⁹

The statute establishing the center stated that “[t]he state department [of health] shall administer the center. The state health commissioner, subject to

309. *Id.* at 422-23.

310. *Id.* at 423.

311. *Id.*

312. *Id.*

313. *Id.* at 424 (citing *State ex rel. Coffin v. Superior Court of Marion County*, 149 N.E. 174, 177 (Ind. 1925)).

314. *Id.*

315. The constitution describes the “Departments” of Indiana government as Legislative, Executive (including Administrative) and Judicial, and this article adopts that language. IND. CONST. art. III, § 1.

316. *Nolan*, 864 N.E.2d at 423-24.

317. 853 N.E.2d 156 (Ind. Ct. App. 2006).

318. *Id.* at 158-59.

319. *Id.* at 159.

[Indiana Code section] 20-35-2, has complete administrative control and responsibility for the center.”³²⁰ Those opposing closure, however, argued that the center was established by statute and that Executive Department officials could not close the center, consistent with distribution of powers principles, until the General Assembly repealed the statute establishing the center.³²¹

The state officials argued that the statute conveying ““complete administrative control”” of the center to the health commissioner also conveyed the power to close the center.³²² Those opposing closure argued that statutes establishing the center contained mandatory language; moreover, they argued, complete administrative control should not be read to include the power to close the center, which would leave nothing left to administer.³²³

The Indiana Court of Appeals read the relevant statutes to allow the commissioner to close the center.³²⁴ The court concluded that the legislative grant of ““complete administrative control”” had to include the power to close the center.³²⁵ Also, in situations in which the Executive Department chose to close other state facilities, the legislature intervened by forbidding closure or imposing conditions; no such intervention occurred in this case, signaling lack of legislative opposition to closure.³²⁶

Those opposing closure also argued that closure violated article IX, section 1, which requires the legislature ““to provide, by law, for the support of institutions for the education of the deaf, the mute, and the blind; and for the treatment of the insane.””³²⁷ The court concluded that this constitutional provision allows the legislature to delegate operation of these institutions to the Executive Department and that the authority delegated in the case of the center included the authority to close the center.³²⁸

In *Jones v. Womacks*,³²⁹ the Indiana Court of Appeals invalidated a statute on separation of powers grounds, but the Indiana Supreme Court vacated the court of appeals’s decision without a published decision after the General Assembly amended the statute to respond to the court of appeals’ opinion.³³⁰ The case addressed Indiana Code section 6-1.1-20-3.2 (Supp. 2007), governing petition and remonstrance proceedings for political subdivisions’s building projects.³³¹ While the merits of the case were decided under the United States Constitution,

320. IND. CODE § 16-33-3-4 (Supp. 2007).

321. *Combs*, 853 N.E.2d at 160.

322. *Id.* (quoting IND. CODE § 16-33-3-4 (Supp. 2007)).

323. *Id.* at 161.

324. *Id.*

325. *Id.* (quoting IND. CODE § 16-33-3-4 (Supp. 2007)).

326. *Id.*

327. *Id.* (quoting IND. CONST. art. IX, § 1).

328. *Id.*

329. 852 N.E.2d 1035 (Ind. Ct. App. 2006), *trans. granted and opinion vacated*, 869 N.E.2d 459 (Ind. 2007).

330. *Id.* at 1036.

331. *Id.*

the treatment of mootness by both Indiana appellate courts and the court of appeals's remedy implicated distribution of powers principles under article III.

The case arose in the context of proposed capital improvements for Indianapolis Public Schools totaling \$800 million in several phases.³³² Under the challenged statute, several steps had to occur before a political subdivision could levy property taxes to pay debt for capital improvements.³³³ First, the political subdivision had to publish notice indicating that property owners wishing to initiate a petition and remonstrance process against the debt service had to file a petition not more than thirty days after publication.³³⁴ The petition had to include the signatures of "'the lesser of . . . one hundred (100) owners of real property within the political subdivision' or 'five percent (5%) of the owners of real property within the political subdivision.'"³³⁵ If the county auditor did not certify that an adequate number of property owners have signed, then the building project may go forward.³³⁶

If the county auditor did certify the petitions as bearing the signatures of an adequate number of property owners, a further thirty-day process would take place in which supporters of the project (called "petitioners" in the statute) gather signatures of property owners and opponents of the project ("remonstrators") gather signatures against it.³³⁷ If this petition-remonstrance procedure is invoked, the county auditor again tallies the signatures.³³⁸ If the petitioners have more valid signatures, the project goes forward.³³⁹ If the remonstrators have more valid signatures, the building project cannot go forward, and the political subdivision cannot propose a substantially similar project for at least one year.³⁴⁰

Jones, a renter, challenged the requirement that only property owners could be signatories to the petitions and remonstrances.³⁴¹ He had children in Indianapolis Public Schools, but he rented property rather than owning it.³⁴² He argued that although he had children in the schools (and therefore an interest in the petition-remonstrance process), he was statutorily precluded from taking part in the process because he was not a property owner.³⁴³ The Indiana Court of Appeals ruled that excluding renters from the petition-remonstrance process

332. *Id.*

333. *See* IND. CODE § 6-1.1-20-3.1 (Supp. 2007). Although the statute directly governed levying property taxes to pay off capital debt, in practice the debt itself could not be issued until there was a method in place for paying the debt. Thus, in practice, the statutory procedures had to be followed before the debt could be issued in the first place. *Jones*, 852 N.E.2d at 1037.

334. *Jones*, 852 N.E.2d at 1037.

335. *Id.* (quoting IND. CODE § 6-1.1-20-3.1(4) (Supp. 2007)).

336. *Id.*

337. *Id.* at 1037-38.

338. *Id.* at 1038.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 1034.

343. *Id.*

violated the Equal Protection Clause of the United States Constitution because the process constituted an “election,” and states may not exclude voters from elections without a compelling reason.³⁴⁴

To reach the merits of the issue, however, the court of appeals first had to address the State’s argument that the case was moot and should be dismissed.³⁴⁵ By the time Jones’s case reached the appellate stage, the petition-remonstrance process was long since completed (the school building program was overwhelmingly approved).³⁴⁶ The court of appeals recognized that cases usually are dismissed as moot when any ruling would not change the status quo.³⁴⁷ But it also recognized that Indiana courts are not restricted by a “case or controversy” requirement, and “Indiana courts have long recognized that a case may be decided on its merits under an exception to the general rule when the case involves questions of ‘great public interest.’”³⁴⁸ The court found that the issue Jones raised was likely to recur in other cases, but that the statutory time constraints on the petition-remonstrance process meant that no such future litigation could be resolved before the petition-remonstrance process was concluded.³⁴⁹ The court also concluded that Jones’s issue was substantial and important.³⁵⁰ The court therefore decided to address the issue on the merits despite mootness.³⁵¹

After ruling that the statute unconstitutionally excluded Jones, the court stated that it was “not inclined to overstep our judicial role and attempt to re-draft [s]ection 3.2 to remedy the constitutional infirmities we perceive.”³⁵² Instead, the court stayed the effectiveness of its holding “until such time as the General Assembly adjourns from its next regularly-scheduled session.”³⁵³ Thus, the court of appeals gave wide berth to the legislative branch to address the constitutional problem by re-drafting the statute. If the legislature did not act by the court’s deadline, however, the court’s decision would go into effect and future petition-remonstrance processes would be governed by it.³⁵⁴

The General Assembly changed the statute in response to the court of appeals’s decision by permitting all registered voters to participate in the petition-remonstrance process.³⁵⁵ The Indiana Supreme Court, by a 3-2 vote, then granted transfer and dismissed the appeal without opinion. The court’s docket entry indicates that the appeal was dismissed because the statutory change

344. *Id.* at 1050.

345. *Id.* at 1040.

346. *Id.* at 1039.

347. *Id.* at 1040.

348. *Id.* (quoting *In re Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991)).

349. *Id.* at 1042.

350. *Id.* at 1044.

351. *Id.* at 1048.

352. *Id.* at 1050.

353. *Id.*

354. *Id.*

355. *See* IND. CODE § 6-1.1-20-3.1 (Supp. 2007).

mooted the case.³⁵⁶

B. Dual Lucrative Offices

The much discussed but seldom litigated prohibition against holding more than one lucrative office was addressed by the Indiana Court of Appeals in *Thompson v. Hayes*.³⁵⁷ Thompson sued Hayes, alleging that Hayes was holding two lucrative offices, deputy sheriff and county commissioner.³⁵⁸ Article II, section 9 states that “no person may hold more than one lucrative office at the same time, except as expressly permitted in this Constitution.”³⁵⁹

The court of appeals repeated that an office is lucrative if it involves compensation for services rendered.³⁶⁰ It also repeated the definition of office, “‘a position for which the duties include the performance of some sovereign power for the public’s benefit, are continuing, and are created by law instead of contract.’”³⁶¹ Someone working for government may be an employee (whose duties are created by contract) or an officer (whose duties are created by law and include some portion of sovereign authority).

The parties agreed, and the court confirmed, that the position of county commissioner is a lucrative office.³⁶² It is compensated, and its duties are created by law and involve some portion of the sovereign power. The parties disagreed about whether a deputy sheriff was a lucrative officeholder.³⁶³ Drawing some assistance from past decisions, the court concluded that a deputy sheriff is not a public officeholder.³⁶⁴ The statutes establishing county police forces (also known as sheriffs’ deputies) make deputies subordinate to the elected sheriff.³⁶⁵ The court concluded that deputies’ duties are imposed by contract, and sheriffs supervise and control deputies, meaning that while a sheriff is a public officer, a sheriff’s deputies are not.³⁶⁶ Hayes’s employment as a deputy and election as a county commissioner therefore did not violate article II, section 9.³⁶⁷

356. See *Jones v. Womacks*, 869 N.E.2d 459 (Ind. 2007). Transfer occurred as a result of a very unusual process. No party sought transfer, but after the court of appeals’s ruling was final, several schools and local governments were permitted to intervene in the litigation. Only those post-decision intervenors petitioned for transfer.

357. 867 N.E.2d 654 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 210 (Ind. 2007).

358. *Id.* at 656.

359. IND. CONST. art. II, § 9.

360. *Thompson*, 867 N.E.2d at 657.

361. *Id.* (quoting *Gaskin v. Beier*, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993)).

362. *Id.*

363. *Id.*

364. *Id.* at 658-59 (citing *Rush v. Carter*, 468 N.E.2d 236, 237 (Ind. Ct. App. 1984); *Gaskin v. Beier*, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993)).

365. *Id.* at 658 (citing IND. CODE § 36-8-10-4(a) (2007)).

366. *Id.* at 658-59.

367. *Id.* at 659.

C. Pardon

The Indiana Court of Appeals explored the effect of a gubernatorial pardon in *Blake v. State*.³⁶⁸ Blake was pardoned in 2005 for a 1992 conviction, and he petitioned a trial court for expungement of his arrest, conviction, and incarceration records to ease his effort to become a member of the bar.³⁶⁹ The court of appeals concluded that the law requires expungement of all conviction records when a pardon is issued because the effect of a pardon is as if the conviction never existed.³⁷⁰ The court then looked at expunging arrest records, a process governed by statute, and found that the statutory terms for expunging arrest records were not met by the pardon.³⁷¹ The statute allows expungement of arrest records only when no charges are filed or charges are dropped for certain enumerated reasons.³⁷² After examining case law from other jurisdictions, the court concluded that in the absence of statutory authority to the contrary, the pardon itself provided no basis for expunging arrest records.³⁷³

D. Taxation

The Indiana Tax Court applied the principles of article X, section 1 in affirming an administrative decision to deny a property tax exemption in *Department of Local Government Finance v. Roller Skating Rink Operators Ass'n*.³⁷⁴ The association sought an exemption for "Roller Skating University," where rink operators could take various courses.³⁷⁵ The Indiana Tax Court ruled that the facility was not entitled to an educational purpose exemption because of the specialized nature of its course offerings.³⁷⁶ The educational exemption is available for facilities that provide education or training that otherwise would be provided in tax supported schools, so that the facilities seeking exemption relieve the taxpayers of a burden they would otherwise bear.³⁷⁷ Because the courses at Roller Skating University were limited to professional development for roller rink owners, they did not meet this standard.³⁷⁸

368. 860 N.E.2d 625 (Ind. Ct. App. 2007).

369. *Id.* at 626.

370. *Id.* at 627.

371. *Id.* at 626-27.

372. *Id.* (citing IND. CODE § 35-38-5-1 (2004)).

373. *Id.* at 628-31.

374. 853 N.E.2d 1262, 1267 (Ind. 2006).

375. *Id.* at 1263-64.

376. *Id.* at 1266-67.

377. *Id.* at 1265.

378. *Id.* at 1266.

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

Indiana's appellate courts tackled a variety of significant issues during the survey period October 1, 2006, to September 30, 2007. As in recent years, sentencing issues dominated the dockets of both courts,¹ although a wide range of other topics also got some play, including jury selection and deliberation, exclusion of late-disclosed witnesses, trials in absentia, and insufficient evidence to uphold unseemly behavior that did not fall within the language of the charged criminal statutes.² The General Assembly also adopted legislation that largely returned matters to the status quo on issues related to sentencing and late amendments to the charging information, while breaking new ground in creating a violent offender registry and revising several statutes related to sex crimes. This Article seeks not only to summarize the significant legislation and opinions of the past year, but also to offer some perspective on their likely future impact.

I. LEGISLATIVE DEVELOPMENTS

Several bills affecting criminal law and procedure were adopted by the General Assembly during the 2007 session. Many of these were in response to recent cases that had changed the prevailing interpretation or understanding of a statute, although the legislature also created a violent offender registry and revised statutes related to sex crimes.

A. Late Amendments to Charging Information

Indiana Code section 35-34-1-5(b) has long distinguished between amendments of "substance" and those correcting immaterial defects. The former were allowed if made at least thirty days before the omnibus date in felony prosecutions, while the latter were allowed at any time as long as they do not prejudice the substantial rights of the defendant.³ In *Fajardo v. State*,⁴ the Indiana Supreme Court acknowledged that its precedent and that of the court of appeals had deviated at times from this clear statutory language. Specifically, "[s]everal cases have permitted amendments related to matters of substance

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1. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 40 IND. L. REV. 789 (2007).

2. The appellate courts also addressed important issues related to search and seizure under article I, section 11 and Indiana's double jeopardy clause, IND. CONST. art. I, § 14, many of which are summarized in the survey of Indiana constitutional law. Jon Laramore, *Indiana Constitutional Developments: Incremental Change*, 41 IND. L. REV. 923, 934-42 (2008).

3. IND. CODE § 35-34-1-5(b) (2004 & Supp. 2007).

4. 859 N.E.2d 1201 (Ind. 2007), *superceded by statute*, IND. CODE § 35-34-1-5 (Supp. 2007).

simply on [the] grounds that the changes did not prejudice the substantial rights of the defendant, without regard to whether or not the amendments were untimely.”⁵ Others

have not focused upon whether the challenged amendment was one of form or substance, but have employed components of the substance/form test (whether defense equally available and evidence equally applicable, and whether amendment not essential to making a valid charge) to assess whether the defendant’s substantial rights were prejudiced, which is not a controlling factor for permitting substantive amendments.⁶

The court forthrightly concluded that these approaches do not comply with the plain language of the statute.⁷ The amendment to the charging information in *Fajardo* was one of substance and was not sought until seven days after the omnibus date.⁸ Therefore, the amendment did not comply with the statute, and the resulting conviction and sentence were ordered vacated.⁹

The relief for defendants was short-lived, however. *Fajardo* was legislatively overruled, effective May 8, 2007, when the Governor signed Senate Bill 45, amending the statute as follows:

(b) The indictment or information may be amended in matters of substance ~~or form~~, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time:

(1) up to:

(+) (A) thirty (30) days if the defendant is charged with a felony;
or

(2) (B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;
before the omnibus date; or

(2) before the commencement of trial;
if the amendment does not prejudice the substantial rights of the defendant. When the information or indictment is amended, it shall be signed by the prosecuting attorney **or a deputy prosecuting attorney.**¹⁰

B. Limitations on Consecutive Sentences

In January, the court of appeals in *Robertson v. State*¹¹ took an exceedingly literal approach in construing one provision of the 2005 “*Blakely* fix”

5. *Id.* at 1206.

6. *Id.*

7. *Id.* at 1207.

8. *Id.* at 1208.

9. *Id.*

10. IND. CODE § 35-34-1-5(b) (2004 & Supp. 2007).

11. 860 N.E.2d 621 (Ind. Ct. App.), *aff’d*, 871 N.E.2d 280 (Ind. 2007).

amendments to the sentencing statute, which replaced the fixed “presumptive” term for each offense with a sentencing range and an “advisory” term within that range.¹² At the time, Indiana Code section 35-50-2-1.3(c) provided that “a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional term.”¹³ Disagreeing with a decision of another panel in *White v. State*,¹⁴ the court concluded that this language was “clear and unambiguous and imposes a separate and distinct limitation on a trial court’s ability to deviate from the advisory sentence for any sentence running consecutively.”¹⁵

Both the General Assembly and the Indiana Supreme Court quickly and strongly disagreed. The Indiana Supreme Court found that the language was not clear and unambiguous.¹⁶ The court noted that section 1.3 “taken as a whole, underscores that there is no requirement to impose the advisory sentences.”¹⁷ Although subsection 1.3(b) provides a “general grant of unfettered discretion,” subsection 1.3(c) “identifies three circumstances in which the advisory sentence is required to be used.”¹⁸ These include certain offenses that are part of a single episode of criminal conduct and sentences for certain repeat offenders.¹⁹ In each of these, “the function of the advisory sentence is qualitatively different from its function in most sentencing statutes.”²⁰ The court concluded that the 2005 amendments “did no more than retain the fixed maximum sentences permissible under the episode and repeat offender provisions.”²¹ The amendments did not impose additional restrictions on the trial court’s ability to impose consecutive sentences.²²

Although legislative intent is often difficult, if not impossible, to divine in Indiana, few would dispute that the 2005 amendments were intended simply to rectify *Blakely* concerns.²³ There is no suggestion the amendments were intended to limit the long-standing ability of trial courts to impose aggravated and consecutive sentences in most circumstances. Indeed, Senate Bill 45, which passed during the 2007 session, included the following provision that legislatively overruled the court of appeals decision in *Robertson*:

12. See generally *Smylie v. State*, 823 N.E.2d 679, 685 (Ind. 2005) (explaining previous version of the statute and holding that it did not comply with the Sixth Amendment).

13. *Robertson*, 860 N.E.2d at 624.

14. 849 N.E.2d 735 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 595 (Ind. 2006).

15. *Robertson*, 860 N.E.2d at 625.

16. *Robertson v. State*, 871 N.E.2d 280, 285 (Ind. 2007).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 285-86.

23. See generally Michael Limrick, *Senate Bill 96: How General Assembly Returned Problem of Uniform Sentencing to Indiana’s Appellate Courts*, RES GESTAE, Jan./Feb. 2006, at 18.

(b) Except as provided in subsection (c), a court is not required to use an advisory sentence.

(c) In imposing:

(1) consecutive sentences **for felony convictions that are not crimes of violence (as defined in [Indiana Code section] 35-50-1-2(a)) arising out of an episode of criminal conduct**, in accordance with [Indiana Code] 35-50-1-2;

(2) an additional fixed term to an habitual offender under section 8 of this chapter; or

(3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;

a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

(d) This section does not require a court to use an advisory sentence in imposing consecutive sentences for felony convictions that do not arise out of an episode of criminal conduct.²⁴

C. Sentencing Statements Required in All Felony Cases

The same piece of legislation that legislatively overruled *Fajardo* and the court of appeals's opinion in *Robertson* also included a provision favorable to criminal defendants and arguably all those involved in the criminal justice system. Requiring judges to explain their reasons for imposing a specific sentence within the fairly broad statutory range for an offense increases confidence and respect for the criminal justice system.²⁵ The new provision pointedly requires: "After a court has pronounced a sentence for a felony conviction, the court shall issue a statement of the court's reasons for selecting the sentence that it imposes."²⁶

This language appears to require sentencing statements in every felony case, even if the trial court imposes the advisory sentence. As explained in Part II.A, this is consistent with the Indiana Supreme Court's interpretation of the pre-2007 version of the statute.²⁷ The statute does not resolve all issues, however. First, the remedy for the trial court's failure to make a sentencing statement is not mentioned in the statute. The supreme court has held that appellate courts may remand the case, reduce the sentence pursuant to the review and revise power of Appellate Rule 7(B), or affirm the sentence as appropriate under Rule 7(B).²⁸ Second, the precise wording of this new section is a bit awkward. Generally, a

24. IND. CODE §§ 35-50-2-1.3(b)-(d) (Supp. 2007).

25. Schumm, *supra* note 1, at 808.

26. IND. CODE § 35-38-1-1.3 (Supp. 2007).

27. *See infra* Part II.A.

28. *See infra* notes 56-71 and accompanying text.

trial court will make findings of aggravating and mitigating circumstances and then pronounce a sentence of a specific number of years. Read literally, the new subsection seems to suggest that trial courts should select a sentence—and then state the reasons for it. Recent practice suggests that trial judges are continuing their practice of explaining reasons before imposing a sentence, which is preferable to a post-hoc justification for the number of years imposed.

D. New Defense to Sexual Misconduct with a Minor

Previously, Indiana Code section 35-42-4-9 imposed criminal liability whenever a person had sex with a child who was fourteen or fifteen years old.²⁹ The person charged could be of a similar age and have been dating the “victim” of the offense. In 2007 a new defense was added to this offense.³⁰ This defense applies only when several conditions are met, including that the accused is not more than four years older than the victim, was engaged in a dating or ongoing personal relationship with the victim, which does not include a family relationship, and had not previously committed another sex offense.³¹ This defense seems especially important with the expanded and harsher requirements of sex offender registries. A young person who has sex with another young person in a dating relationship is less deserving of the prolonged labeling as a “sex offender,” “violent sexual predator,” and so on. This defense not only prevents registration, but also prevents a felony conviction, which can have

29. IND. CODE § 35-42-4-9 (2004).

30. *See* IND. CODE § 35-42-4-9(e) (Supp. 2007).

31. *Id.* The exact requirements are quoted below:

(e) It is a defense to a prosecution under this section if all the following apply:

(1) The person is not more than four (4) years older than the victim.

(2) The relationship between the person and the victim was a dating relationship or an ongoing personal relationship. The term “ongoing personal relationship” does not include a family relationship.

(3) The crime:

(A) was not committed by a person who is at least twenty-one (21) years of age;

(B) was not committed by using or threatening the use of deadly force;

(C) was not committed while armed with a deadly weapon;

(D) did not result in serious bodily injury;

(E) was not facilitated by furnishing the victim, without the victim’s knowledge, with a drug (as defined in [Indiana Code section] 16-42-19-2(1)) or a controlled substance (as defined in [Indiana Code section] 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim’s knowledge; and

(F) was not committed by a person having a position of authority or substantial influence over the victim.

(4) The person has not committed another sex offense (as defined in [Indiana Code section] 11-8-8-5.2) (including a delinquent act that would be a sex offense if committed by an adult) against any other person.

deleterious effects on a person's future.

E. Sex and Violent Offender Registry

Several changes were made to Indiana's offender registry. Most notably, it now requires the registration not only of sex offenders but also of some "violent" offenders, such as those who commit murder or voluntary manslaughter.³² The sex offender registry was expanded to require registration for additional offenses including promoting prostitution as a Class B felony, human or sexual trafficking of minors, and first-time possession of child pornography.³³ The registry was also curtailed in one important respect. Persons convicted of sexual misconduct with a minor as a Class C felony may now be excluded from the registry if they were not more than four or five years older than the victim and "the sentencing court finds that the person should not be required to register as a sex offender."³⁴

F. No More Polygraphs for Victims of Sex Offenses

A new statutory provision was added to prohibit law enforcement officers from requiring alleged victims of sexual offenses to submit to a polygraph or other truth-telling device.³⁵ This provision further provides that law enforcement officers may not refuse to investigate, charge, or prosecute a sex crime "solely" because the alleged victim has refused to submit to a polygraph.³⁶ Although such legislation arguably has some symbolic value, law enforcement officers were never likely to ask a victim to submit to a polygraph unless they had serious concerns about his or her veracity. The reliability of polygraphs has been repeatedly criticized by Indiana courts,³⁷ and curtailing their use is difficult to criticize. However, the practical effect of this legislation seems minimal. If a law enforcement officer did not believe a victim or had serious qualms about the ability to make a case, charges were unlikely to be pursued before the new statute was passed. The same will hold true now, especially in the absence of a polygraph.

II. SENTENCING: STILL THE MAIN EVENT

Of the hundreds of published opinions in criminal cases decided during the survey period, more than half addressed some type of sentencing claim. Many cases addressed only sentencing claims, because the defendant pleaded guilty and forfeited any right to challenge conviction-related issues.³⁸ In the farthest

32. *Id.* §§ 11-8-8-5; IND. CODE § 36-2-13-5.5 (2004).

33. IND. CODE § 11-8-8-4.5 (Supp. 2007).

34. *Id.* § 11-8-8-5(a)(8). Exceptions were also made for parents or guardians convicted of kidnapping or confining their own children. *Id.* § 11-8-8-5(a)(11)-(12).

35. *Id.* § 35-37-4.5-2.

36. *Id.* § 35-37-4.5-3.

37. See, e.g., *Willey v. State*, 712 N.E.2d 434, 441 (Ind. 1999).

38. See generally *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006); *Tumulty v. State*, 666

reaching sentencing opinion, *Anglemyer v. State*,³⁹ the supreme court held that trial courts are required to make “reasonably detailed” sentencing statements in all felony cases despite recent statutory amendments that the court of appeals had suggested eliminated this requirement.⁴⁰ Beyond *Anglemyer*, decisions also addressed important issues regarding the scope of belated appeals, limitations on allocution and evidence presented at sentencing, review of the appropriateness of sentences under Rule 7(B), and the propriety of probation conditions. Finally, the courts began to wrestle with plea agreement provisions that could significantly reduce the number of sentencing appeals through waivers of the right to appeal a sentence.

A. Sentence Statements (Still) Required

As discussed in detail in last year’s survey, considerable confusion arose when the General Assembly amended Indiana’s sentencing statutes, effective April 25, 2005, to replace the “presumptive” sentence with a range and “advisory” term in response to the Indiana Supreme Court’s holding that *Blakely v. Washington*⁴¹ rendered Indiana’s sentencing statutes unconstitutional.⁴² The legislation also added the following language that has led to further confusion: “A court may impose any sentence that is: (1) authorized by statute; and (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances.”⁴³

In Indiana, “the sentencing statute in effect at the time a crime is committed governs the sentence for that crime.”⁴⁴ In several cases, the court of appeals has explicitly held that the date of the offense controls which version of the statute applies.⁴⁵ Therefore, a threshold question in any case is which version of the statute applies. If a crime was committed before April 25, 2005, defendants may avail themselves of the protections of *Blakely* and *Smylie*, which require proof beyond a reasonable doubt to a jury of any facts that enhance the sentence

N.E.2d 394 (Ind. 1996).

39. 868 N.E.2d 482 (Ind.), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007).

40. *Id.* at 491.

41. 542 U.S. 296 (2004).

42. Schumm, *supra* note 1, at 801-03.

43. IND. CODE § 35-38-1-7.1(d) (Supp. 2007).

44. Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

45. *See Weaver v. State*, 845 N.E.2d 1066, 1070-71 (Ind. Ct. App. 2006) (discussing the ex post facto implications of a contrary holding), *trans. denied*, 855 N.E.2d 1011 (Ind. 2007); *see also* *Primmer v. State*, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 447 (Ind. 2007); *Walsman v. State*, 855 N.E.2d 645, 650 (Ind. Ct. App. 2006); *Creekmore v. State*, 853 N.E.2d 523, 528 (Ind. Ct. App.), *clarified on denial of reh’g*, 858 N.E.2d 230 (Ind. Ct. App. 2006); *Patterson v. State*, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006); *Henderson v. State*, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). The only apparent outlier is *Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (citing *Ritchie v. State*, 809 N.E.2d 258, 264 (Ind. 2004)), where a panel simply noted “this change in the statute is procedural rather than substantive.”

beyond the presumptive term.⁴⁶ If the crime was committed after April 25, however, the new sentencing scheme applies.

In May 2006 the court of appeals began to grapple with the new statutory language in *Anglemyer v. State*.⁴⁷ There, the court held that the finding of aggravators and mitigators as part of a sentencing statement was no longer required and the failure to do so was unavailable as an appellate claim.⁴⁸ Transfer was granted in that case,⁴⁹ and other panels took different views.⁵⁰

In *Anglemyer v. State*,⁵¹ Justice Rucker, writing for a unanimous Indiana Supreme Court, provided a comprehensive overview of the events relating to the statutory amendments and the resulting divisions in the court of appeals. The court correctly acknowledged the new statutory language “suggests a legislative acknowledgement that a sentencing statement identifying aggravators and mitigators retains its status as an integral part of the trial court’s sentencing procedure.”⁵² In order to facilitate the important goals of fair and consistent sentencing, the court concluded that trial courts must “enter sentencing statements whenever imposing sentence for a felony offense [T]he statement must include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence.”⁵³ Such sentencing statements will be reviewed on appeal for an abuse of discretion.⁵⁴ Trial courts may abuse their discretion by “failing to enter a sentencing statement at all,”⁵⁵ citing reasons that are not supported by the record, omitting reasons clearly supported by the record, or citing reasons that are improper as a matter of law.⁵⁶ Finally, although defendants cannot challenge the weight or value assigned to the reasons cited at sentencing under the abuse of discretion standard, they may continue to challenge “the merits of a sentence” under the inappropriateness standard of Appellate Rule 7(B).⁵⁷

Applying this new framework to the facts in *Anglemyer*, the court first reviewed those mitigating circumstances that were argued to the trial court: the

46. See *Smylie v. State*, 823 N.E.2d 679, 683 (Ind. 2005) (applying *Blakely v. Washington*, 542 U.S. 296 (2004)).

47. 845 N.E.2d 1087 (Ind. Ct. App. 2006), *vacated on trans.*, 868 N.E.2d 482 (Ind. 2007), and *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007).

48. *Id.* at 1091.

49. 855 N.E.2d 1012 (Ind. 2006).

50. See, e.g., *Gibson v. State*, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). The *Gibson* court concluded that the appellate court must “assess the trial court’s recognition or nonrecognition of aggravators and mitigators” whenever a trial court issues a sentencing statement. *Id.*

51. 868 N.E.2d 482 (Ind.), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007). This Author represented Mr. Anglemyer pro bono in transfer proceedings before the Indiana Supreme Court.

52. *Id.* at 490.

53. *Id.*

54. *Id.* at 491.

55. *Id.* at 490.

56. *Id.* at 490-91.

57. *Id.* at 491.

defendant's youthful age and his purported mental illness.⁵⁸ The trial court cited his age as a mitigating circumstance, but did not mention his mental illness.⁵⁹ After reviewing the evidence presented at sentencing regarding mental illness, the Indiana Supreme Court concluded "that rather than overlooking Anglemyer's mental illness, the trial court determined [that] it was not significant and thus would not be a factor influencing the trial court's sentencing decision. This was the trial court's call."⁶⁰ Regarding the appropriateness of the sentence under Rule 7(B), the court noted the nature of the offense was "unnecessarily brutal."⁶¹ Regarding the defendant's character, the court cited his modest criminal history and status on bond at the time of the offense.⁶² The court also relied on the facts of the crime, as it related to the defendant's character, noting that the crime "was carried out through subterfuge, deceit, and careful planning."⁶³ The court concluded that neither the nature of the offense nor the defendant's character justified a revision of the sentence.⁶⁴

Although *Anglemyer* lays down clear rules and guidelines, the extent to which it has teeth remains to be seen. On the same day *Anglemyer* was issued, the court also decided *Windhorst v. State*.⁶⁵ There, the court acknowledged that the trial court had made no sentencing statement, despite the defense arguing several mitigating circumstances including the ones typically found weighty, such as a lack of criminal history and guilty plea.⁶⁶ Although the court reiterated that a trial court may abuse its discretion by failing to enter a sentencing statement, it nevertheless affirmed based on its "authority to review and revise the sentence."⁶⁷ Specifically, the court noted that the court of appeals had reviewed the sentence under Rule 7(B) and declined to revise it.⁶⁸ The Indiana Supreme Court summarily affirmed that portion of the court of appeals's opinion.⁶⁹

Windhorst suggests a new approach to the interplay between review of aggravators and mitigators in contrast to review under Rule 7(B). Numerous opinions have differentiated between "procedural" claims regarding aggravators

58. *Id.* at 492.

59. *Id.*

60. *Id.* at 493.

61. *Id.* at 494.

62. *Id.*

63. *Id.*

64. *Id.* The court later granted a petition for rehearing to clarify that defendants who plead guilty do not forfeit the opportunity to claim on appeal that a trial court should have considered their guilty plea as a mitigating circumstance even when the claim was not asserted in the trial court. 875 N.E.2d 218, 219-20 (Ind. 2007) (citing *Francis v. State*, 817 N.E.2d 235, 237 n.2 (Ind. 2004)).

65. 868 N.E.2d 504 (Ind. 2007). This Author represented Mr. Windhorst on appeal.

66. *Id.* at 505.

67. *Id.* at 507.

68. *Id.*

69. *Id.*

and mitigators and substantive claims under Appellate Rule 7(B).⁷⁰ The separate inquiries previously gave defendants two different ways to win. Now it appears that Rule 7(B) can be used as a means to defeat an otherwise valid claim of improper aggravators and mitigators.⁷¹

The aftermath of *Anglemyer* and *Windhorst* has been mixed, although the overriding principle seems to be that the appellate court has discretion in fashioning a remedy for a sentencing irregularity. For example, less than a month after *Anglemyer*, the court of appeals acknowledged *Windhorst* in a footnote, but remanded a case for resentencing when the trial court imposed the advisory term of ten years for a B felony but failed to enter a sentencing statement “setting forth its reasons.”⁷² The court simply noted it had the option to remand for a clarification or new sentencing determination, affirm the sentence if the error was harmless, or reweigh the proper aggravators and mitigators independently at the appellate level—then the court selected the first option with no explanation as to why it was the appropriate one.⁷³ Days later, however, another panel opted to review a sentence under Rule 7(B) after finding that the trial court abused its discretion in not identifying the defendant’s decision to plead guilty as a substantial mitigating factor.⁷⁴ The court upheld the ten-year sentence for B felony robbery based largely on the defendant’s “extensive juvenile and adult criminal history,” which was not offset by the mitigating weight of his early guilty plea.⁷⁵

Nevertheless, *Anglemyer* is a welcome decision in many respects; it lays down fairly clear guidelines for both trial and appellate courts and the lawyers who practice in them. Its scope is broad and inclusive; sentencing statements are required in all felony cases. Prior case law regarding improper aggravators and mitigators appears to remain intact under the abuse of discretion standard, and meaningful substantive review will seemingly continue under Rule 7(B).

B. Keeping the Floodgates Closed: Blakely Claims Cannot Be Raised on Belated Appeal

Although sentencing claims are typically raised in a timely direct appeal, sometimes this does not occur. Indiana offers two avenues to challenge a conviction or sentence not raised on direct appeal: (1) a petition for post-conviction relief or (2) a belated appeal.⁷⁶ The combination of many recent sentencing developments led to a flood of petitions to pursue belated sentencing

70. See, e.g., *McCann v. State*, 749 N.E.2d 1116, 1119 (Ind. 2001); *Noojin v. State*, 730 N.E.2d 672, 678 (Ind. 2000); *Hope v. State*, 834 N.E.2d 713, 717-18 (Ind. Ct. App. 2005); *Anderson v. State*, 743 N.E.2d 1273, 1279 (Ind. Ct. App. 2001).

71. See *Windhorst*, 868 N.E.2d at 507.

72. *Ramos v. State*, 869 N.E.2d 1262, 1264 (Ind. Ct. App. 2007).

73. *Id.*

74. *Felder v. State*, 870 N.E.2d 554, 559 (Ind. Ct. App. 2007).

75. *Id.*

76. IND. R. POST-CONVICTION RELIEF 1, 2.

appeals by incarcerated defendants who had pleaded guilty years earlier but had never appealed their sentence.⁷⁷ Specifically, defendants sought to take advantage of the invalidation of Indiana's sentencing statutes and the requirement that a sentence could not exceed the presumptive term unless based on facts proved to a jury beyond a reasonable doubt under *Blakely* and *Smylie*.⁷⁸

In *Gutermuth v. State*,⁷⁹ the Indiana Supreme Court firmly closed the door on such claims. The court reasoned that if Gutermuth had filed his appeal within the prescribed period he would not have been able to raise a challenge under *Blakely* and *Smylie*.⁸⁰ The court held that finality, as the term is used in *Griffith v. Kentucky*,⁸¹ occurs "when the time for filing a timely direct appeal has expired."⁸² The court reasoned that treating belated appeals like timely direct appeals would allow the belated ones to "remain perpetually 'not yet final' for purposes of *Griffith*."⁸³ Therefore, defendants cannot raise a *Blakely* claim in a belated appeal.⁸⁴

C. Conflicts in Oral and Written Sentencing Orders

An overarching concern in appellate review of sentences is the contours of the record to be reviewed and any conflicts within it. In *McElroy v. State*,⁸⁵ the Indiana Supreme Court addressed the situation in which the trial court's oral sentencing statement conflicts with its written judgment order.

Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court. This Court has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing. This is different from pronouncing a bright line rule that an oral sentencing statement trumps a written one.⁸⁶

This appears to be a departure from other cases, which emphasized the controlling nature of the oral statement.⁸⁷ Nevertheless, although it does not

77. See generally Schumm, *supra* note 1, at 790-94 (discussing significant cases concerning belated appeals).

78. See *Smylie v. State*, 823 N.E.2d 679, 683 (Ind. 2005) (applying *Blakely v. Washington*, 542 U.S. 296 (2004)).

79. 868 N.E.2d 427 (Ind. 2007).

80. *Id.* at 434.

81. 479 U.S. 314 (1987).

82. *Gutermuth*, 868 N.E.2d at 434.

83. *Id.* at 435.

84. *Id.* *Gutermuth* and its companion cases are thoughtfully discussed in a recent article in the Indiana State Bar Association's journal. See Michael R. Limrick, *Belated Appeals and Blakely (or is it Apprendi?) Retroactivity*, RES GESTAE, July/Aug. 2007, at 28.

85. 865 N.E.2d 584 (Ind. 2007).

86. *Id.* at 589 (citation omitted).

87. See, e.g., *Whatley v. State*, 685 N.E.2d 48, 50 (Ind. 1997); *Marshall v. State*, 621 N.E.2d

offer the predictability and ease of a bright line, the flexibility of the *McElroy* approach is likely to ensure that the trial court's intent is carried out.

D. Limitations on Evidence and Allocution at Sentencing

During the survey period, the appellate courts clarified important procedures regarding the evidence that may be admitted at sentencing hearings and defendants' allocution rights.

1. *Restrictions on Evidence*.—In *Wilson v. State*,⁸⁸ the trial court refused to allow the defendant to submit evidence of his family history, employment history, and mental health history at his sentencing hearing because he did not cooperate with the probation officer who prepared his pre-sentence investigation report.⁸⁹ Relying on federal due process and the state statute that provides defendants are “entitled to subpoena and call witnesses and to present information [on their] own behalf,”⁹⁰ the appellate court concluded the trial court erred in “refusing to admit evidence presented on Wilson’s behalf through the testimony of others at the sentencing hearing.”⁹¹ Finding the State had failed to prove the harmlessness of the error beyond a reasonable doubt, the court vacated the sentence and remanded to the trial court “to hold another sentencing hearing, during which Wilson may present witnesses on his behalf.”⁹²

2. *Allocution*.—The appellate courts also issued opinions further clarifying the right to allocution at sentencing. In *Biddinger v. State*,⁹³ Justice Rucker provided a comprehensive and thoughtful review of this important “opportunity at sentencing for criminal defendants to offer statements in their own behalf before the trial judge pronounces sentence.”⁹⁴ According to statute, criminal defendants who appear for sentencing after a trial may “make a statement personally in the defendant’s own behalf and, before pronouncing sentence, the [trial] court shall ask the defendant whether the defendant wishes to make such a statement.”⁹⁵ That statute does not apply to sentencing hearings held after a guilty plea or probation revocation hearing, but defendants are not wholly without protection.

In *Vicory v. State*,⁹⁶ the Indiana Supreme Court held that a defendant who specifically requests to make a statement at a probation revocation hearing should be allowed to do so.⁹⁷ The court’s decision was grounded at least in part

308, 323 (Ind. 1993).

88. 865 N.E.2d 1024 (Ind. Ct. App. 2007).

89. *Id.* at 1028-29.

90. *Id.* at 1029 (quoting IND. CODE § 35-38-1-3 (2004)).

91. *Id.*

92. *Id.* at 1030.

93. 868 N.E.2d 407 (Ind. 2007).

94. *Id.* at 410.

95. IND. CODE § 35-38-1-5(a) (2004).

96. 802 N.E.2d 426 (Ind. 2004).

97. *Id.* at 429. If a defendant does not speak or object to the lack of an opportunity to speak,

in article I, section 13 of the Indiana Constitution, which “‘places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges.’”⁹⁸

In *Biddinger*, the court extended this reasoning to cases in which the defendant pleaded guilty.⁹⁹ Because there is no statutory right to allocution in such cases, the trial court need not ask the defendant if the defendant would like to make a statement.¹⁰⁰ “But when a defendant specifically makes a request of the court for the opportunity to give a statement, as the defendant did in this case, then the request should be granted.”¹⁰¹ Because such statements are not evidence but “more in the nature of closing argument,” defendants are not subject to cross-examination.¹⁰²

There are boundaries to such statements, however. They may not be “‘platform speeches on either philosophical, religious or political issues.’”¹⁰³ Rather, “[t]he defendant only has a right to express his views of the facts and circumstances surrounding his case and to articulate reasons as to why judgment should not be imposed at that time.”¹⁰⁴

Although the right of allocution is certainly an important one, the failure to allow such a statement is subject to harmless error analysis. Indeed, in *Biddinger* the supreme court reviewed the full statement the defendant wanted to read at sentencing and found it largely cumulative of other evidence presented at trial and sentencing.¹⁰⁵ Because the defendant failed “to establish how the excluded portion of his statement would have made a difference in the sentence the trial court imposed,” the sentence was affirmed.¹⁰⁶

Allowing a defendant an opportunity to address the court before sentence is imposed is a minimal burden that serves an important function. It takes at most a few minutes but will likely give defendants a sense they are being treated more fairly. Furthermore, it allows all those in the courtroom—most importantly the trial court, which must impose sentence—an opportunity to understand, for better or worse, the defendant’s view of events.

E. Appellate Rule 7(B)

Yet again this year, Indiana’s appellate courts engaged in thoughtful

the right to allocution is waived. *Hull v. State*, 868 N.E.2d 901, 902 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 213 (Ind. 2007).

98. *Vicory*, 802 N.E.2d at 429 (quoting *Sanchez v. State*, 749 N.E.2d 509, 520 (Ind. 2001)).

99. *Biddinger v. State*, 868 N.E.2d 407, 412 (Ind. 2007).

100. *Id.*

101. *Id.*

102. *Id.* at 413.

103. *Id.* at 413 n.9 (quoting *Ross v. State*, 676 N.E.2d 339, 344 (Ind. 1996)).

104. *Id.* (quoting *Ross*, 676 N.E.2d at 344).

105. *Id.* at 412-13.

106. *Id.* at 413.

substantive review of sentences in many cases pursuant to the constitutional power to review and revise sentences¹⁰⁷ as implemented through Appellate Rule 7(B). Since a rule amendment in 2003, Rule 7(B) allows for a sentence revision if the sentence is “inappropriate in light of the nature of the offense and the character of the offender.”¹⁰⁸ The extent to which this power is used and results in a reduction in a term of years since the adoption of the new rule was well explained in *Stewart v. State*.¹⁰⁹ There, Judge Barnes noted that the Indiana Supreme Court “has now decided a total of twenty-two cases under the ‘inappropriate’ standard in place since January 2003 and revised the sentence in eleven of those cases.”¹¹⁰ In addition to this impressive inventory, the *Stewart* opinion also pointedly and appropriately “urge[d] the State to discontinue citing earlier cases from this court stating that our review of sentences under Rule 7(B) is ‘very deferential’ to the trial court and that we exercise our authority to revise sentences ‘with great restraint.’”¹¹¹ Those cases suggest “excessive deference to the trial court under Rule 7(B), which clearly conflicts with the current, more vigorous approach to revising sentences that a majority of our supreme court has adopted.”¹¹²

Although *Stewart* predated *Anglemyer*, there is little reason to think that *Anglemyer* altered or reduced the chances of a reduction under Rule 7(B), although the terminology has changed a bit. Rather than aggravating and mitigating circumstances, the trial court must now make a “reasonably detailed recitation of the trial court’s reasons” that then form the basis of sentence review in light of the nature of the offense and character of the offender.¹¹³

Sentences above the presumptive consecutive terms, and now sentences at or near the top of the advisory range, have always been and remain the best candidates for a reduction. For example, in *Prickett v. State*,¹¹⁴ the trial court found four aggravating circumstances, no mitigating circumstances, and imposed an enhanced forty-year sentence for Class A felony child molesting.¹¹⁵ The Indiana Supreme Court reduced the sentence to thirty years, reasoning that “[u]pon review of the aggravating factors considered by the trial court, we find none of them sufficiently weighty to justify a ten-year sentence enhancement.”¹¹⁶ Although the court found one of the aggravators improper,¹¹⁷ it did not expressly find the other three (criminal history, use of force, and probation status)

107. IND. CONST. art. VII, §§ 4, 6.

108. *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005) (observing that Rule 7(B) provides relief “when certain broad conditions are satisfied”).

109. 866 N.E.2d 858 (Ind. Ct. App. 2007).

110. *Id.* at 865-86.

111. *Id.* at 865.

112. *Id.* at 866.

113. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007); see also *supra* Part II.A.

114. 856 N.E.2d 1203 (Ind. 2006).

115. *Id.* at 1205-06.

116. *Id.* at 1209.

117. *Id.* at 1208.

improper.¹¹⁸ It simply held that each was given “too much weight” by the trial court.¹¹⁹ Although the presumptive sentence is generally proper when aggravating and mitigating circumstances are in balance, the Indiana Supreme Court ordered imposition of the presumptive sentence in light of three aggravators (of minimal weight) and no mitigators.¹²⁰

The nature of the offense may sometimes justify a reduction of a sentence. In *Duncan v. State*,¹²¹ a grandmother who gave her two-year-old grandson part of a methadone tablet that killed him was charged with felony murder (for causing death while dealing a controlled substance) and other offenses.¹²² She was sentenced to sixty-two years with ten of those years suspended. The Indiana Supreme Court reduced the sentence to the minimum term of forty-five years.¹²³ The court observed that the defendant’s conduct qualified as murder “only through a series of stretches” and that her “prior convictions and charges were neither sufficiently weighty [n]or similar to the current offense to justify enhancing the sentence.”¹²⁴

Rather than focusing on the nature of the offense, however, most requests for reduction are grounded in the character of the offender. As summarized in previous survey articles, factors such as an absence of criminal history, an early guilty plea coupled with acceptance of responsibility, and a longstanding mental illness are frequently invoked by defendants and appellate courts in the sentence reduction calculus.¹²⁵ A defendant’s youthful age is another factor that sometimes helps contribute to a reduction.¹²⁶ For example, in *James v. State*,¹²⁷ the court of appeals found the maximum-consecutive sentences totaling twenty-eight years inappropriate for a non-violent sixteen-year-old.¹²⁸ The defendant committed several offenses that impacted the property of individuals and businesses and had a history of delinquent behavior dating back to shortly after his ninth birthday.¹²⁹ Nevertheless, the court was impressed with the defendant’s plea of guilty, his “tough childhood that exposed him to harsh circumstances and left him diagnosed with several psychological issues and an addiction to drugs and alcohol,” and most importantly his young age of sixteen at the time of the non-violent offenses.¹³⁰ The court ordered the twenty-eight year sentence

118. *Id.* at 1208-09.

119. *Id.* at 1209.

120. *Id.*

121. 857 N.E.2d 955 (Ind. 2006).

122. *Id.* at 956.

123. *Id.* at 960.

124. *Id.*

125. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 37 IND. L. REV. 1003, 1019-23 (2004).

126. *Id.*

127. 868 N.E.2d 543 (Ind. Ct. App. 2007).

128. *Id.* at 549.

129. *Id.*

130. *Id.*

reduced to presumptive concurrent terms (four years).¹³¹

Although many advisory or presumptive sentences are challenged as inappropriate, few result in reductions. *Duncan* and *Biehl v. State*¹³² appear to be the only two. Extraordinary circumstances must exist, such as the combination of powerful mitigation regarding both the nature of the offense and character of the offender. For example, the advisory sentence of thirty years for voluntary manslaughter was not reduced in *Eversole v. State*,¹³³ even though the defendant had pleaded guilty, had no criminal history, and “was generally known for being a hard-working family man.”¹³⁴ Although the court of appeals acknowledged this mitigation, it found it “difficult to ignore the serious nature of Eversole’s offense—specifically, that his actions resulted in the death of another human being.”¹³⁵ The death of a human being is part of every voluntary manslaughter case, however, and seems inappropriate to count against a defendant in assessing the nature of the offense.¹³⁶ Even more troubling is the appellate court’s statement that “the trial court followed the recommendation of Eversole’s Probation Officer in sentencing him.”¹³⁷ Although trial courts are required to review a pre-sentence investigation report before sentencing a defendant for a felony,¹³⁸ nothing in the statute or case law suggests that a probation officer’s opinion of an appropriate sentence should dictate the sentence imposed by the trial court or the amount of deference given to that sentence on appeal. Rather, Rule 7(B) review focuses on the nature of the offense and character of the offender, cognizant that “a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”¹³⁹

G. Probation Conditions

The Indiana Court of Appeals has generally given trial courts wide discretion in imposing probation conditions. For example, in *Taylor v. State*,¹⁴⁰ the court of appeals upheld the imposition of a condition of probation requiring a

131. *Id.*

132. 738 N.E.2d 337 (Ind. Ct. App. 2000).

133. 873 N.E.2d 1111 (Ind. Ct. App. 2007), *trans. denied*, No. 39A04-0701-CR-29, 2008 Ind. LEXIS 85, at *1 (Ind. Jan. 17, 2008).

134. *Id.* at 1114.

135. *Id.*

136. *See generally* West v. State, 755 N.E.2d 173, 186 (Ind. 2001) (“[A] presumptive sentence already assumes the underlying elements and that it is therefore improper to enhance a sentence based on an act for which the defendant is already presumed to be punished.”); *see also* Biehl, 738 N.E.2d at 340-41 (reducing thirty-year sentence for voluntary manslaughter to minimum term of twenty years in light of the defendant’s lack of criminal history and longstanding mental illness).

137. *Eversole*, 873 N.E.2d at 1114.

138. IND. CODE § 35-38-1-8 (2004).

139. *Serino v. State*, 798 N.E.2d 852, 854 (Ind. 2003).

140. 820 N.E.2d 756 (Ind. Ct. App. 2005).

defendant convicted of operating a vehicle while intoxicated to establish paternity for a child he always supported financially and who was not on public assistance.¹⁴¹ Although trial courts certainly have discretion to establish conditions “to create law-abiding citizens and to protect the community,” those conditions must “have a reasonable relationship to the treatment of the accused and the protection of the public.”¹⁴² It is difficult to find a reasonable relationship between drunk driving and paternity.¹⁴³

The tide could be turning, albeit it slightly. In *McVey v. State*,¹⁴⁴ the court struck down four conditions of probation for a man convicted of child molesting. Specifically, the court followed its precedent in finding a prohibition on pornographic or other material related to “deviant interests or behaviors” to be unconstitutionally vague.¹⁴⁵ It provided specific guidance from *Smith v. State*¹⁴⁶ for the trial court to consider to ensure that the condition is “narrowly tailored to the goals of protecting the public and promoting [McVey’s] rehabilitation.”¹⁴⁷ Next, the court found fault with the requirement that McVey notify his probation officer of the establishment of a “dating” relationship. The State argued that a date is a “pre-arranged social activity with another individual whether innocuous or sexually related.”¹⁴⁸ The court found that it would impose an “unreasonable burden” on McVey to require him “to report the most mundane activities, like going out for coffee with a friend.”¹⁴⁹ Third, the court struck down the requirement that McVey “must report any incidental contact with persons under age 18 to your probation officer within 24 hours of the contact.”¹⁵⁰ Finally, the court adhered to *Fitzgerald v. State*¹⁵¹ and held that a restriction on being present at “other specific locations where children are known to congregate in your community” was unconstitutionally vague.¹⁵² Although the first and fourth of the conditions had been previously invalidated, the court broke new ground and seemingly engaged in a more exacting review in striking the second and third.

141. *Id.* at 758.

142. *Id.* at 760 (quoting *Jones v. State*, 789 N.E.2d 1008, 1010 (Ind. Ct. App. 2003)).

143. *Taylor* and other cases are discussed in a 2006 survey article, which explores the lack of a consistent and appropriate framework for reviewing such claims. See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 39 IND. L. REV. 893, 919-21 (2006).

144. 863 N.E.2d 434 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007). This Author represented Mr. McVey on appeal.

145. *Id.* at 447.

146. 779 N.E.2d 111 (Ind. Ct. App. 2002).

147. *McVey*, 863 N.E.2d at 448.

148. *Id.*

149. *Id.* at 448-49.

150. *Id.* at 449.

151. 805 N.E.2d 857 (Ind. Ct. App. 2004).

152. *McVey*, 863 N.E.2d at 449.

H. The Future of Sentencing Appeals: Waiver of the Right to Appeal a Sentence?

Finally, as discussed in last year's survey, the Indiana Supreme Court's opinion in *Childress v. State*¹⁵³ was not greeted enthusiastically by some trial judges and prosecutors.¹⁵⁴ There, the court held that defendants who plead guilty have a right to appeal the sentence if the trial court exercised any discretion at sentencing, even if the discretion involved the place where the sentence would be served.¹⁵⁵ That article noted that some prosecutors had

already responded to *Childress* by including a provision in plea agreements stating that defendants are forfeiting their right to appeal the sentence. Although defendants have a constitutional right to appeal their sentence, this right—like almost all others in the criminal realm—could seemingly be waived if the waiver is knowing, intelligent, and voluntary.¹⁵⁶

It did not take long for one of these plea provisions to make its way to the Indiana Court of Appeals and the Indiana Supreme Court. In *Perez v. State*,¹⁵⁷ the court of appeals was confronted with the following plea provision: "Defendant waives any right to appeal his conviction and sentence in this cause either by direct appeal or by post conviction relief."¹⁵⁸ The trial court engaged in a colloquy with the defendant to ensure that he understood he was waiving his right to appeal the sentence if he was sentenced within the parameters of the plea agreement.¹⁵⁹ Although no prior Indiana decision had addressed whether the right to direct appeal could be expressly waived in a plea agreement, the court noted that such agreements are contractual in nature and permissible in federal court.¹⁶⁰ The court held the waiver was valid.¹⁶¹

Weeks later, another panel confronted a similar issue but with a slight twist. In *Creech v. State*,¹⁶² the plea agreement included the following provision: "I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement."¹⁶³ Even though "the trial court did not engage Creech in a colloquy at the guilty plea hearing regarding the effect of this

153. 848 N.E.2d 1073 (Ind. 2006).

154. Schumm, *supra* note 1, at 799-801.

155. *Id.* at 801 (citing *Hole v. State*, 851 N.E.2d 302 (Ind. 2006); *Davis v. State*, 851 N.E.2d 1264 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006)).

156. Schumm, *supra* note 1, at 800 (footnotes omitted).

157. 866 N.E.2d 817 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).

158. *Id.* at 819.

159. *Id.* at 819-20.

160. *Id.*

161. *Id.* at 820.

162. No. 35A02-0612-CR-1140, 2007 WL 2230775, at *1 (Ind. Ct. App. Aug. 6, 2007), *trans. granted*, 878 N.E.2d 214 (Ind. 2007).

163. *Id.* at *1.

waiver provision,” the court of appeals found the mere inclusion of the term sufficient to constitute a waiver of the defendant’s right to a direct appeal of his sentence.¹⁶⁴

The Indiana Supreme Court granted transfer in *Creech*¹⁶⁵ and heard oral argument in November 2007. A decision is pending but will likely address the propriety of such plea provisions, as well as whether a colloquy is required to establish that they were knowingly, voluntarily, and intelligently made. Such a colloquy seems like a minimal burden in light of the many other rights addressed during a guilty plea hearing.

More significantly, although such provisions have not become customary in many counties, especially the ones with a high appellate caseload such as Marion and Lake, they could become more common if the Indiana Supreme Court gives its imprimatur to such plea provisions as it is expected to do when it decides *Creech*. The extent to which this will reduce appeals to the court of appeals, however, remains to be seen. As suggested in last year’s survey, “if prosecutors require a plea to the lead or only charge, some defendants may decide not to sign the agreement and instead plead guilty without an agreement or go to trial.”¹⁶⁶ A waiver provision is arguably an important bargaining chip for defendants in at least some cases. Of course, such provisions are not necessary when the parties truly negotiate and include a term that allows the trial court no sentencing discretion.

III. DEVELOPMENTS OUTSIDE THE SENTENCING REALM

In addition to sentencing, scores of published opinions addressed other issues relating to Indiana criminal law and procedure during the survey period. This brief survey seeks to explore those issues that have had or are likely to have a significant impact on criminal cases from beginning to end.

A. *Timely Filing of Warrants*

An old adage equates timeliness to Godliness. That might overstate things a bit, but a lack of timeliness by police and prosecutors can lead to serious consequences.

Indiana Code section 35-33-5-2(a) requires that search or arrest warrants not be issued until the person seeking the warrant has filed an affidavit with the judge describing the place to be searched or person to be arrested.¹⁶⁷ In *State v. Rucker*,¹⁶⁸ an Indiana State Police officer presented an affidavit for a search

164. *Id.* at *2.

165. *Creech v. State*, 878 N.E.2d 214 (Ind. 2007).

166. Schumm, *supra* note 1, at 800.

167. IND. CODE § 35-33-5-2(a) (2004).

168. 861 N.E.2d 1240 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007). The Indiana Supreme Court heard oral argument on June 21, 2007, after which it denied the State’s petition to transfer. The denial of transfer does not technically enhance the pedigree of a case. *See* IND. R. APP. P. 58(B) (“The denial of a Petition to Transfer shall have no legal effect other than to terminate

warrant to a judge, secured the judge's approval, conducted a search the same day, but did not file the warrant and supporting affidavit with the clerk of court until fifteen days later.¹⁶⁹

The court of appeals had cautioned law enforcement officers and prosecutors to comply with the statute two years ago in *Bowles v. State*,¹⁷⁰ where the detective failed to file his affidavit in support of a search warrant until the day after the search.¹⁷¹ Although the court did not invalidate the search in *Bowles*, finding the detective had "substantially complied" with the statute, it gave notice that "other circumstances" could lead to a different result.¹⁷²

The fifteen-day delay in *Rucker* was such a situation. In upholding the trial court's grant of the defendant's motion to suppress, the court of appeals found "irrelevant" the State's arguments that the untimely filing "did not affect any important function of the warrant requirement" and the failure of the defendant to argue or show prejudice.¹⁷³ The court simply quoted the language of the statute in support of this view. However, many statutory violations do not lead to reversal. Appellate Rule 66, which mirrors the language of Trial Rule 61, provides that

[n]o error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.¹⁷⁴

Because the alleged error is a statutory violation, this standard—and not the much more difficult one for the State of proving harmlessness beyond a reasonable doubt—would apply.¹⁷⁵

B. Jurors and Jury Trials

Several cases explored the proprieties and nuances of jury selection and conduct. Errors in either jury selection or the handling of juror requests were fairly common and may require reversal.

1. *Anonymous Juries*.—As a general rule, the names of jurors are disclosed to the trial court and parties during selection unless "the jury needs protection

the litigation between the parties in the Supreme Court." It does suggest something about the court's thinking—and the likelihood the court will take a case involving the same issue in the near future.

169. *Rucker*, 861 N.E.2d at 1240-41.

170. 820 N.E.2d 739 (Ind. Ct. App. 2005).

171. *Id.* at 746.

172. *Id.*

173. *Rucker*, 861 N.E.2d at 1241-42.

174. IND. APP. R. 66(A).

175. See generally *Fleener v. State*, 656 N.E.2d 1140, 1142 (Ind. 1995); cf. *Chapman v. California*, 386 U.S. 18, 23 (1967).

from external sources.”¹⁷⁶ There are not many big mafia-type trials in Indiana, and state statutes previously made explicit that juror names had to be disclosed “long enough before the trial . . . to permit counsel to study their backgrounds.”¹⁷⁷ This suggested that juror names be disclosed to counsel in just about every trial.

In *Major v. State*,¹⁷⁸ the defendant challenged the use of an anonymous jury based on a Lake County local rule. The State conceded and the court of appeals held that “a determination as to the propriety of an anonymous jury requires judicial consideration on a case-by-case basis and is not justifiable based solely upon a local rule authorizing the wholesale use of anonymous juries.”¹⁷⁹ Nevertheless, the court found the error subject to federal harmless error analysis.¹⁸⁰ Because the defendant had confessed, the parties were given “substantial biographical and background information regarding each juror to provide for a thorough voir dire,” and the jury was instructed that the defendant was presumed innocent, the court of appeals found the error of using an anonymous jury harmless.¹⁸¹

Majors invalidated the Lake County local rule authorizing anonymous juries. It is not clear how many other counties have similar rules, but they are all seemingly invalidated as well. This is significant in itself but also as part of trend of invalidating local rules that are inconsistent with constitutional rights, statutes, or the Indiana Trial Rules.¹⁸²

2. *Peremptory Challenges*.—In *Highler v. State*,¹⁸³ the Indiana Supreme Court provided a comprehensive discussion of the use of peremptory challenges based on race, religious affiliation, religious beliefs, and occupation. There, the State used a peremptory challenge to strike an African-American pastor who had expressed concerns about the fairness of the legal system.¹⁸⁴ The State further justified the challenge on the basis that pastors were more inclined to be lenient and forgiving.¹⁸⁵

The supreme court observed that “religious affiliation, like race and gender, is an impermissible basis for striking a prospective juror.”¹⁸⁶ However, the State’s justification for the strike was the juror’s occupation, and challenges based on occupation have generally been found constitutional.¹⁸⁷ This includes

176. William D. Bremer, *Propriety of Using Anonymous Juries in State Criminal Cases*, 60 A.L.R.5TH 39 (1998).

177. IND. CODE § 33-28-4-9(b) (2004) (repealed 2007).

178. 873 N.E.2d 1120 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 220 (Ind. 2007).

179. *Id.* at 1127.

180. *Id.* at 1128-29.

181. *Id.* at 1130.

182. See, e.g., *Snell v. State*, 866 N.E.2d 392, 400-01 (Ind. Ct. App. 2007) (invalidating Allen County local rule on jury instruction because it conflicted with Trial Rule 51).

183. 854 N.E.2d 823 (Ind. 2006).

184. *Id.* at 827.

185. *Id.*

186. *Id.* at 829.

187. *Id.* at 830.

“peremptorily striking religious leaders from juries because they may be sympathetic to defendants.”¹⁸⁸

Although the defendant did not prevail in *Highler*, Indiana law remains fairly pro-defendant in the context of peremptory challenges. *Highler* relied on *McCormick v. State*,¹⁸⁹ which held that when a prosecutor cites multiple reasons, some of which are permissible and some that are not, a *Batson* violation is established.¹⁹⁰ The *Highler* case also repeated the principles that the removal of the only African-American juror that could have served on the jury raises “an inference that the juror was excluded on the basis of race,” necessary to establish a *prima facie* case and shift the burden to the State to present a race-neutral explanation for striking the juror.¹⁹¹

Scholars and even judges have criticized *Batson* as a fairly empty guarantee because nearly any explanation will be accepted as race neutral.¹⁹² As Judge Kirsch put it in a recent dissenting opinion: “[F]ew prosecutors or other trial counsel are so inept that, when faced with a *Batson* challenge, they are unable to utter an explanation that is facially racially neutral for striking all members of a cognizable racial group from a prospective jury panel.”¹⁹³ Contrary to the majority, he opined that “only the trial judge can determine whether the peremptory challenge is racially motivated,” unlike the majority, which made the assessment on appeal when the trial court failed to do so.¹⁹⁴ More broadly, Judge Kirsch expressed the view that he

would like to see our jurisprudence move to the point that to use a peremptory challenge to strike the only prospective members of a cognizable racial group from a prospective jury requires more than a showing of racial neutrality. I would like to see such challenges treated as challenges for cause. Finally, I would like to see the burden placed on the party who exercises peremptory challenges to strike all members of a racial group to show an absence of racial motivation, not on the party who opposes the challenges.¹⁹⁵

Although *Batson*’s goal of ensuring that “‘no citizen is disqualified from jury service because of his race’ remains elusive,”¹⁹⁶ a recent infraction trial highlights the easy road for reversal when a trial court and prosecutor do not

188. *Id.*

189. 803 N.E.2d 1108 (Ind. 2004).

190. *Id.* at 1112-13.

191. *Highler*, 854 N.E.2d at 827 (quoting *McCormick*, 803 N.E.2d at 1111).

192. See generally Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 168, 179-80 (2005).

193. *Jones v. State*, 859 N.E.2d 1219, 1226 (Ind. Ct. App.) (Kirsch, C.J., dissenting), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

194. *Id.*

195. *Id.*

196. *Id.* (quoting *Batson v. Kentucky*, 476 U.S. 79, 99 (1986)).

understand the decisional law surrounding the case. In *Schumm v. State*,¹⁹⁷ the defendant raised a *Batson* challenge when the State sought to peremptorily strike the only African-American juror. The trial court and prosecutor believed the Caucasian defendant could not raise a *Batson* challenge, and the trial court further found that striking only one juror is “not a pattern.”¹⁹⁸ The court of appeals recited the established principles that “a party may raise a *Batson* claim regardless of his or her race”¹⁹⁹ and that striking the sole African-American juror puts forth prima facie evidence of racial discrimination.²⁰⁰ It did not suggest the possibility of finding a race neutral reason on its own, as the majority had done in *Jones*.²⁰¹ Rather, because the State did not provide a race-neutral explanation, the trial court’s rejection of the *Batson* claim was clearly erroneous and a new trial was ordered.²⁰²

3. *Juror Deliberations*.—In *Ronco v. State*,²⁰³ the Indiana Supreme Court addressed the interplay of the relatively new Jury Rules and a longstanding statute and case law as they apply to a jury’s question during deliberations. Decisional law has long held that trial courts confronted with a question from a deliberating jury should “reply by rereading all instructions, to avoid improper influence.”²⁰⁴ Much more recently, the court adopted Jury Rule 28, which provides:

“If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors’ response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.”²⁰⁵

The supreme court found Rule 28 inapplicable because it “confers discretionary authority for ‘further proceedings’ only at moments of ‘impasse,’ by which is meant something far closer to a deadlocked jury than occurred here.”²⁰⁶ Specifically, Ronco’s jury simply asked a question about the findings necessary to convict him of resisting law enforcement. “A question is not an

197. 866 N.E.2d 781 (Ind. Ct. App.), *reh’g granted*, 868 N.E.2d 1202 (Ind. Ct. App. 2007). In the spirit of full disclosure, the defendant in the case is the Author of this Article.

198. *Id.* at 788.

199. *Id.* at 789 (citing *Powers v. Ohio*, 499 U.S. 400, 415 (1991)).

200. *Id.* (citing *McCants v. State*, 686 N.E.2d 1281, 1284 (Ind. 1997)).

201. *Id.* at 790; *cf.* *Jones v. State*, 859 N.E.2d 1219 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

202. *Schumm*, 866 N.E.2d at 790.

203. 862 N.E.2d 257 (Ind. 2007).

204. *Id.* at 259 (citing *Lewis v. State*, 424 N.E.2d 107, 111 (Ind. 1981)).

205. *Id.* (quoting IND. JURY R. 28).

206. *Id.* at 260.

impasse.”²⁰⁷ Moreover, “indication of an impasse must come from the jury’s leader or from the jury as a whole.”²⁰⁸

Nevertheless, the court held it was proper under Indiana Code section 34-36-1-6 for the trial court to respond to the question. That statute “empowers a court to respond to either juror disagreement over testimony or the jury’s desire ‘to be informed as to any point of law arising in the case.’”²⁰⁹

Following *Ronco*, the court of appeals determined in *Perry v. State*,²¹⁰ that a note that simply asked what would happen if the jurors could not arrive at a unanimous verdict did not evince an “impasse” under Jury Rule 28.²¹¹ There, however, the majority reversed a murder conviction based on a scrivener’s error in responding to another note from the deliberating jurors.²¹² The note included four questions, one of which was whether a witness had made a specific statement about seeing the defendant shoot a gun.²¹³ The trial court referenced the defendant’s first name instead of the witness’s name in its typed response to the question.²¹⁴ The defendant argued this suggested that he—and not the person named in the note—must have fired shots, and the resulting prejudice was “incalculable.”²¹⁵ Agreeing that it was “impossible” to assess “what effect the scrivener’s error had on the jury” and that the evidence was “not overwhelming” in the case, the court of appeals reversed.²¹⁶

4. *Discussing Evidence During Recesses.*—Finally, in *Buckner v. State*,²¹⁷ the court of appeals addressed the proper contours of instructing jurors on their ability to discuss the trial during recesses. The trial court gave the pattern jury instruction, which provided in relevant part:

“[Y]ou may discuss the evidence with your fellow jurors in the jury room during recesses from trial when all are present as long as you reserve judgment about the outcome of the case until the deliberations begin.

....

... You should not form or express an opinion or reach any conclusion in this case until you have heard all of the evidence, the

207. *Id.*

208. *Id.*

209. *Id.* (quoting IND. CODE § 34-36-1-6 (2004)).

210. 867 N.E.2d 638 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 210 (Ind. 2007).

211. *Id.* at 643.

212. *Id.* at 639.

213. *Id.* at 640-41.

214. *Id.* at 644.

215. *Id.*

216. *Id.* Judge Crone dissented, reasoning that the defendant had failed to object to the typographical error and it was “extremely unlikely” that the jury was misled by the typographical error. *Id.* at 644-45 (Crone, J., dissenting).

217. 857 N.E.2d 1011 (Ind. Ct. App. 2006).

arguments of counsel and the final instructions as to the law.”²¹⁸

This language is based on the Indiana Jury Rules, which allow “trial courts to facilitate and assist jurors in the deliberative process . . . in order to avoid mistrials.”²¹⁹ The defendant challenged the instruction on the basis that the words “discussion” and “deliberation” have the same meaning, and juror separation is not permitted once “deliberation” has begun according to statute.²²⁰

The court of appeals upheld the instruction, reasoning that it properly told the jurors they should “reserve judgment,” that is, they could discuss the evidence without forming opinions or reaching a conclusion.²²¹ It rejected the defendant’s suggestion that jurors cannot be impartial when they discuss a case prior to deliberations. Specifically, the defendant “pointed to no evidence suggesting that jurors can no longer remain impartial when they discuss the evidence prior to the actual deliberative process.”²²² It is unclear how a defendant could make such a showing when Indiana Rule of Evidence 606(b) precludes juror testimony about their “mental processes.”²²³ Moreover, general evidence that at least some jurors do make up their mind in the course of these early discussions would seemingly not suffice. Finally, it may well vary from trial to trial which side benefits from allowing these mid-trial “discussions.” If the State calls a witness who is decimated during cross-examination, the juror discussion may well reinforce the weakness of that testimony and push some jurors forcefully toward an acquittal.

C. Trials In Absentia: Waiver of Right to be Present and Right to Counsel by Conduct

Both the Indiana Court of Appeals and Indiana Supreme Court upheld convictions entered against defendants who had failed to appear at their respective trials. Although defendants have a federal and state constitutional right to be present at trial,²²⁴ trial courts may find a knowing and voluntary relinquishment of that right when a defendant fails to appear at trial and fails to notify the court with an explanation of the absence.²²⁵ In *Holtz v. State*, the trial court informed the defendant on at least two occasions of the scheduled court date.²²⁶ Because the defendant did not notify the court that he would be absent or provide an explanation for his absence, the court upheld the trial court’s

218. *Id.* at 1015-16 (omission of emphasis) (quoting IND. PATTERN JURY INSTRUCTION 1.01).

219. *Id.* at 1016 (alteration in original) (quoting *Litherland v. McDonnell*, 796 N.E.2d 1237, 1241 (Ind. Ct. App. 2003)).

220. *Id.* (citing IND. CODE § 35-37-2-6(a)(1) (2004)).

221. *Id.*

222. *Id.*

223. IND. R. EVID. 606(b).

224. U.S. CONST. amend. VI; IND. CONST. art. I, § 13.

225. *Holtz v. State*, 858 N.E.2d 1059, 1062 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 452 (Ind. 2007).

226. *Id.*

decision to try him in absentia.²²⁷ As a final point, the court made clear that defendants must be given an opportunity to explain their absence, but the trial court does not need to make a sua sponte inquiry.²²⁸ The appellate court found no error because the trial court gave the defendant an opportunity to speak at sentencing.²²⁹

Similarly, in *Jackson v. State*,²³⁰ the Indiana Supreme Court held that a defendant's intentional and inexcusable absence from trial can serve as a knowing, voluntary, and intelligent waiver of both his right to be present and his right to counsel.²³¹ First, the majority found the defendant had been informed of his trial date at a pretrial conference, both orally and in writing, and never contacted the court regarding any confusion or inability to hire counsel or attend.²³² This was sufficient to constitute to a voluntary and knowing waiver of the right to be present.²³³

Next, the majority also concluded that the defendant waived his right to counsel.²³⁴ The record showed that he had "repeatedly disregarded scheduled events" and been through multiple lawyers before the trial court issued "an order setting a third and final trial date and directing Jackson to retain new counsel as he had said he would."²³⁵ Under these circumstances, the majority found no need to warn the defendant of the perils of self-representation when he never indicated a desire to proceed pro se: "We cannot expect a trial court to hunt down a defendant to admonish him about the dangers and disadvantages of self-representation if the defendant has made no indication to the trial court that he intends to proceed pro se and then subsequently does not show up for trial."²³⁶

Justice Rucker, joined by Justice Sullivan, dissented as to the waiver of counsel, reasoning that "the import of the advisement is not only to ensure that a defendant is making a conscious choice about self-representation, but also that the defendant's decision to forgo representation is knowing and voluntary."²³⁷

Although defendants who fail to appear for a trial after being advised of the date are not likely to receive much sympathy from the appellate courts, those who appear but without a lawyer have an easier road to success. For example, in *Hofferth v. State*,²³⁸ the defendant was charged with some drug-related felony offenses, but his lawyer was given permission to withdraw less than a month

227. *Id.*

228. *Id.* at 1062-63.

229. *Id.* at 1063.

230. 868 N.E.2d 494 (Ind. 2007).

231. *Id.* at 496.

232. *Id.* at 499.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 501.

237. *Id.* at 502 (Rucker, J., dissenting).

238. 856 N.E.2d 137 (Ind. Ct. App. 2006).

before his scheduled jury trial.²³⁹ Reiterating that the right to counsel is ““by far the most pervasive”” of all the rights of criminal defendants, the court of appeals chastised the trial court for “blatantly” ignoring the defendant’s repeated requests for counsel on the day of his trial.²⁴⁰ The case was remanded for a new trial in which the defendant’s “right to counsel is the subject of greater concern and less disdain.”²⁴¹

D. Creepy Not Criminal.²⁴² The Primacy of Language in Criminal Statutes

The Indiana Supreme Court and court of appeals both reviewed cases in which the defendant’s conduct seemed inappropriate, if not creepy, but was ultimately found not to be criminal. As the supreme court reiterated, “[a] long-cherished principle of the American justice system is that a citizen may not be prosecuted for a crime without clearly falling within the statutory language defining the crime.”²⁴³ Two cases authored by Justice Dickson applied this principle in a particularly straightforward and no-nonsense manner.

In *Smith v. State*, the court confronted the prosecution of a school bus driver who allegedly rubbed his hand up the slit of the dress of a seventeen-year-old student on the bus he was driving.²⁴⁴ The bus driver was charged with child seduction because he was at least eighteen years old and was purportedly a “child care worker” who had engaged in touching with the intent to arouse sexual desires.²⁴⁵ However, “child care worker” is defined by statute as a person who is “employed by” the school corporation attended by the child.²⁴⁶ The undisputed evidence showed that Smith worked for an independent contractor who provided bus services to the school and was paid by the independent contractor—not the school.²⁴⁷ Observing that penal statutes must be strictly construed against the State, the majority reversed the denial of Smith’s motion to dismiss because he was not a “child care worker” as defined by statute.²⁴⁸

Chief Justice Shepard, joined by Justice Boehm, wrote a concurring opinion in which he explained,

[d]istasteful as it may be given the facts of the present case, I think the Court does the right thing to use the regular, garden-variety definition of

239. *Id.* at 139.

240. *Id.* at 141 (quoting *United States v. Cronin*, 466 U.S. 648, 654 (1984)).

241. *Id.*

242. Unfortunately, this Author cannot take credit for the catchy title of this section. These words were used at trial in defending Mr. Brown, whose case is summarized below. *See Brown v. State*, 868 N.E.2d 464 (Ind. 2007). This Author had the good fortune of representing Mr. Brown on appeal, a case with particularly colorful facts and interesting legal arguments.

243. *Smith v. State*, 867 N.E.2d 1286, 1287 (Ind. 2007).

244. *Id.* at 1287.

245. *Id.* (citing IND. CODE § 35-42-4-7(h) (2004)).

246. *Id.* at 1288 (citing IND. CODE § 35-42-4-7(c) (2004)).

247. *Id.*

248. *Id.* at 1289.

“employed,” with the understanding that the General Assembly has the power to broaden the class of persons covered by the statute should it choose to do so.²⁴⁹

Many of the same principles were applied weeks later in *Brown v. State*,²⁵⁰ where the court reversed convictions for criminal confinement and identity deception entered against a man who had pretended to be a radio DJ.²⁵¹ Specifically, the man

telephoned at least three adult men and falsely informed them of a radio contest in which they could each win a new car or cash if they would drive from their places of employment to a particular address (which happened to be the defendant’s residence), enter and remove all of their clothes, and exchange them for a T-shirt.²⁵²

In regards to identity deception, the court found the State had failed to prove the necessary element that the defendant used “the identifying information” of another person, which is defined by statute as “information that identifies an individual, including an individual’s . . . name, address, date of birth, place of employment, employer identification number, mother’s maiden name, Social Security number, or any identification number issued by a governmental entity.”²⁵³ The court reasoned that the term “individual” is commonly understood to refer to a single human being in contrast to “person,” which might mean an individual human being or a corporate or other legal entity.²⁵⁴ Although there was evidence that Brown used the identifying information of a real radio station, there was no evidence that he used the name or other identifying information of any existing human being.²⁵⁵ Therefore, the identity deception convictions were vacated based on insufficient evidence.²⁵⁶

The court also reversed the convictions for criminal confinement, albeit for different reasons. Although criminal confinement typically involves removing or restraining another person by force, a seldom-used part of the statute also applies when a person removes another by fraud or enticement from one place to another.²⁵⁷ The court found the terms fraud and enticement, neither of which is defined in the statute, to be unconstitutionally vague.²⁵⁸ Because ordinary people understand fraud to mean trickery, deception, or deceit, the statute could apply to “a vast assortment of very acceptable and even salutary conduct that is

249. *Id.* (Shepard, C.J., concurring).

250. 868 N.E.2d 464 (Ind. 2007).

251. *Id.* at 466.

252. *Id.*

253. *Id.* at 469 (quoting IND. CODE § 35-43-5-1(h) (2004)).

254. *Id.* at 469-70.

255. *Id.* at 470.

256. *Id.*

257. *Id.* at 467 (citing IND. CODE § 35-42-3-3(a)(2) (2004)).

258. *Id.*

clearly not criminal in nature,” such as “using misleading reasons to secure a person’s attendance for their surprise birthday celebration [or] evoking Santa Claus’s watchful eye to induce a child to go to bed.”²⁵⁹ Similarly, because enticement “is commonly understood to mean the act of attracting, luring, or tempting another by arousing hope or desire,” a criminal confinement conviction could result from a “broad array of quite acceptable human behavior,” such as “commercial advertising to entice travel or visits to stores or events [or] religious appeals to foster church attendance.”²⁶⁰ The court found such examples “persuasive evidence” that the statute fails to ““indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur[,]”” as is necessary to survive a vagueness challenge.²⁶¹ Moreover, the statute is “vulnerable because it authorizes or encourages arbitrary or discriminatory enforcement.”²⁶²

Not only were the convictions in *Brown* reversed, but the court also made clear that future prosecutions could not continue based on removals by fraud or enticement.²⁶³ Prosecutions may continue, however, for removals by force or threat of force.²⁶⁴

Although not as sweeping as declaring a statute unconstitutionally vague, the court of appeals found insufficient evidence to support a conviction for attempted obstruction of justice in a case also captioned *Brown v. State*.²⁶⁵ Brown was charged with battery against his fiancée and later called her to ask that she change her version of events and not participate in his prosecution.²⁶⁶ Although there was no dispute that Brown intended to induce his fiancée, a witness in an official proceeding, to withhold testimony, obstruction of justice also requires coercion.²⁶⁷ Coercion is some form of pressure or influence that includes a consequence for failure to comply.²⁶⁸ Brown merely stated his opinion that their relationship would improve if his fiancée did not testify.²⁶⁹ Even his statement that he would “lick that **** every night” did not qualify as coercion because it was a statement of what would happen if his fiancée did comply with his request; it gave no indication of what would happen if she did not comply.²⁷⁰ Because the State failed to prove coercion, the conviction was reversed for insufficient evidence.²⁷¹

259. *Id.* at 468.

260. *Id.*

261. *Id.* (quoting *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985)).

262. *Id.* at 469.

263. *Id.*

264. *Id.*

265. 859 N.E.2d 1269 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

266. *Id.* at 1270.

267. *Id.* at 1270-71.

268. *Id.* at 1271.

269. *Id.*

270. *Id.*

271. *Id.*

E. Exclusion of Witnesses

Exclusion of witnesses raises fundamental concerns for anyone who views a trial as a search for the truth—or at least an opportunity for both sides to make their case. During the survey period, the Indiana Supreme Court built on existing case law regarding the extreme nature of excluding defense witnesses, finding exclusion improper in three different cases.

The first came in the self-defense context. After Philip Littler was charged with the murder of his twin brother, Neal, he raised a claim of self-defense asserting that Neal had threatened and attacked him with a knife.²⁷² Philip sought to call their mother to corroborate his testimony about past events and specific actions by Neal that formed the basis of his reasonable belief that Neal posed a threat of serious bodily injury or death.²⁷³ The trial court granted the State's motion in limine to exclude the mother's testimony.²⁷⁴

On appeal, however, the Attorney General conceded that the exclusion was erroneous.²⁷⁵ The supreme court agreed, citing *Brand v. State*,²⁷⁶ for the proposition that “witnesses other than the defendant should be allowed to provide testimony to corroborate the specific prior acts by the victim that a defendant uses to support a claim of self-defense on the grounds of reasonable fear.”²⁷⁷ These prior acts included Neal's prior stabbing of Philip and others as well as Neal's diagnosis and treatment for bipolar disorder, including that he had quit seeking treatment or taking his medication.²⁷⁸

Next, the court rejected the State's argument that the exclusion of the mother's testimony was harmless error.²⁷⁹ The court emphasized that “self-defense includes both subjective and objective components” because the defendant “‘must have actually believed deadly force was necessary to protect himself, and his belief must be one that a reasonable person would have held under the circumstances.’”²⁸⁰ Although Philip was allowed to testify about his actual fear of Neal, he was severely limited in his ability to present evidence of the reasonableness of his fear.

The mother's testimony confirming Neal's numerous prior stabbings, his mental condition, and his history of violent behavior would be very probative and relevant to the jury's evaluation of the objective reasonableness of Philip's belief that he needed to use force against Neal

272. *Littler v. State*, 871 N.E.2d 276, 277 (Ind. 2007).

273. *Id.*

274. *Id.* at 277-78.

275. *Id.* at 278.

276. 766 N.E.2d 772, 782 (Ind. Ct. App. 2002).

277. *Littler*, 871 N.E.2d at 278.

278. *Id.*

279. *Id.* at 279-80.

280. *Id.* at 279 (quoting *Weston v. State*, 682 P.2d 1119, 1121 (Alaska 1984)).

and would also lend substantial credibility to Philip's assertions.²⁸¹

Therefore, the exclusion of evidence was not harmless, and the case was remanded for a new trial.²⁸²

Beyond the self-defense context, the Indiana Supreme Court also reversed convictions in a pair of cases obtained after trials in which defense witnesses were excluded because of their late disclosure.²⁸³ Although trial courts have discretion to exclude belatedly disclosed witnesses when the late disclosure was based on bad faith of defense counsel or would substantially prejudice the State, "[t]he most extreme sanction of witness exclusion should not be employed unless the defendant's breach has been purposeful or intentional or unless substantial or irreparable prejudice would result to the State."²⁸⁴ In deciding whether to exclude a witness, Indiana courts consider the following factors:

(1) the point in time when the parties first knew of the witness; (2) the importance of the witness's testimony; (3) the prejudice resulting to the opposing party; (4) the appropriateness of instead granting a continuance or some other remedy; and (5) whether the opposing party would be unduly surprised and prejudiced by the inclusion of the witness's testimony.²⁸⁵

In *Rohr v. State*, the trial court excluded defense witnesses disclosed four days before trial.²⁸⁶ The supreme court emphasized that the State made no assertion of bad faith on the part of the defense in the late disclosure, and the witnesses' names came from information provided by the State.²⁸⁷ The court found no evidence that the State had been unable to speak with the witnesses in the month after it disclosed the witnesses or the four days after they were added to the defendant's witness list.²⁸⁸ Moreover, "[i]f the four days before trial were truly insufficient for reasonable investigation by the State, a short continuance would have been the appropriate remedy."²⁸⁹ The court found the exclusion improper and reversed the conviction.²⁹⁰

Although a closer call, the supreme court reversed a burglary conviction in

281. *Id.*

282. *Id.* at 280.

283. *See Rohr v. State*, 866 N.E.2d 242 (Ind. 2007); *Vasquez v. State*, 868 N.E.2d 473 (Ind. 2007).

284. *Rohr*, 866 N.E.2d at 245 (alteration in original) (quoting *Williams v. State*, 714 N.E.2d 644, 651 (Ind. 1999)).

285. *Id.*

286. *Id.* at 246.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 247. The court proceeded to reject the State's harmless error argument. *Id.* at 246-47.

another case involving a late-disclosed witness. In *Vasquez v. State*,²⁹¹ the Spanish-speaking defendant did not advise his attorney of a witness until the first day of his jury trial.²⁹² Although the court noted it was not known when the defendant first learned of the potential witness, it focused instead on when defense counsel learned of the witness, finding “no intentional concealment, improper strategic manipulation, or bad faith” on his part.²⁹³ The supreme court acknowledged allowing the testimony of the late-disclosed witness “undoubtedly presented a substantial challenge to the State’s trial strategy[.]” but nevertheless concluded that “the proper exercise of discretion favored a brief continuance instead of witness exclusion.”²⁹⁴

The upshot of all three cases is the “immense importance” of an accused’s “rights to present evidence and to have a fair trial.”²⁹⁵ Although trial courts have discretion to exclude witnesses, exclusion should occur only in cases of bad faith on the part of counsel in the late disclosure. Moreover, rather than seeking exclusion, which many trial courts may grant in cases of belatedly disclosed witnesses, prosecutors who do not want to retry a case should consider requesting a short continuance. Although continuances are widely viewed as discretionary in the criminal justice system, these opinions appear to make them mandatory in such cases, although the length of the continuance would certainly be discretionary.

F. Right to Counsel in Probation Proceedings

Two cases decided near the end of the survey period offer insight into the right to counsel in probation proceedings. In *Bumbalough v. State*,²⁹⁶ the court of appeals reversed a defendant’s revocation of probation because his decision to proceed without counsel at the probation hearing was not voluntary, knowing, and intelligent.²⁹⁷ The defendant watched a videotape that informed him of his right to counsel, including “[i]f you want a lawyer and are unable to afford one, the Court will appoint a lawyer to represent you at no costs, if, after a hearing, you are determined to be financially unable to hire a lawyer.”²⁹⁸ The trial court did not, however, engage in a colloquy with the defendant regarding this right, simply telling him that he had “the right to either admit or deny those allegations at this [t]ime.”²⁹⁹ The court of appeals recited the general principle that defendants in probation proceedings are entitled to representation by counsel, and the record “must reflect that the right to counsel was voluntarily, knowingly, and

291. 868 N.E.2d 473 (Ind. 2007).

292. *Id.* at 474.

293. *Id.* at 477.

294. *Id.*

295. *Id.*

296. 873 N.E.2d 1099 (Ind. Ct. App. 2007).

297. *Id.* at 1102.

298. *Id.* at 1101.

299. *Id.*

intelligent waived” whenever a defendant proceeds without counsel.³⁰⁰ The record must demonstrate an awareness of the “nature, extent, and importance” of the right to counsel and the consequences of waiving that important right.³⁰¹ Although the videotape provided the requisite advisement, the trial court did nothing to determine that the waiver was voluntary, knowing, and intelligent.³⁰² Finding that invalid waivers of counsel are not subject to harmless error analysis, the court of appeals reversed.³⁰³

In *Gosha v. State*,³⁰⁴ the court of appeals held “that a probationer is not entitled to pauper counsel for purposes of appeal when he admits to the violations” of probation.³⁰⁵ The court relied heavily on Indiana Rule of Criminal Procedure 11, which requires an advisement of the right to appeal and right to appointment of counsel if indigent.³⁰⁶ It also found no federal due process requirement of counsel in such circumstances.³⁰⁷

IV. DEATH PENALTY DEVELOPMENTS

Although Indiana has a relatively small death row of fewer than twenty inmates and there is seldom more than one or two new cases filed each year,³⁰⁸ issues surrounding the death penalty generated considerable attention during the survey period. Issues that arise in capital cases often have broader impact to non-capital cases, and thus advance important concerns of the broader criminal justice system.

A. ABA Death Penalty Assessment

In February 2007, the Indiana Assessment Team of the American Bar Association’s Death Penalty Implementation Project released a nearly 400-page report that examined Indiana’s death penalty laws and procedures in the following twelve areas:

- (1) collection, preservation, and testing of DNA and other types of evidence;
- (2) law enforcement identifications and interrogations;
- (3) crime laboratories and medical examiner offices;
- (4) prosecutorial professionalism;
- (5) defense services;
- (6) the direct appeal process;
- (7) state post-conviction proceedings;
- (8) clemency;
- (9) jury instructions;
- (10) judicial independence;
- (11) the treatment of racial and ethnic

300. *Id.* at 1102.

301. *Id.* (quoting *Bell v. State*, 695 N.E.2d 997, 999 (Ind. Ct. App. 1998)).

302. *Id.*

303. *Id.*

304. 873 N.E.2d 660 (Ind. Ct. App. 2007).

305. *Id.* at 663.

306. *Id.* at 662-63.

307. *Id.* at 663 (citing *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)).

308. Clark County Prosecuting Attorney’s Office, Indiana Death Row, <http://www.clark-prosecutor.org/html/death/rownew.htm> (last visited Feb. 3, 2008).

minorities; and (12) mental retardation and mental illness.³⁰⁹

The ABA project examined the death penalty in eight states, including Indiana.³¹⁰ This author chaired the Indiana assessment team, which included former Governor Joseph Kernan, State Senator John Broden, and distinguished lawyers James Bell, Robert Gevers II, Marce Gonzales, and Paula Sites.³¹¹ The report's executive summary concluded:

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Indiana, our research establishes that at this point in time, the state cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Basic notions of fairness require that all participants in the criminal justice system ensure that the ultimate penalty of death is reserved for only the very worst offenses and defendants. Unfortunately, hundreds of Hoosiers are murdered under a variety of heinous circumstances every year. Despite this, only a few of these cases result in a prosecutor seeking a death sentence[], fewer still result in the imposition [of] a death sentence by a jury or judges, and only a handful over the past three decades have resulted in the execution of a defendant.³¹²

The assessment team unanimously recommended a moratorium on executions in Indiana until the State was able to address the many problem areas identified in the report.³¹³ A few of the specific areas of concern include qualification standards for defense counsel, lack of an independent appointing authority, lack of meaningful proportionality review of sentences, capital juror confusion, racial disparity in sentencing, and the imposition of death sentences on those suffering from severe mental illness.³¹⁴

B. An Exemption for Severe Mental Illness?: The Bowser Commission

Although the ABA report received considerable media attention,³¹⁵ its release near the end of the 2007 legislative session meant that immediate change was

309. AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE INDIANA DEATH PENALTY ASSESSMENT REPORT, at iii (2007), available at <http://www.abanet.org/moratorium/assessmentproject/indiana/report.pdf>.

310. American Bar Association, Death Penalty Moratorium Implementation Project, <http://www.abanet.org/moratorium/> (last visited Feb. 3, 2008).

311. AM. BAR ASS'N, *supra* note 309, at 3-4.

312. *Id.* at vii.

313. *Id.* at viii.

314. *Id.* at iv-v.

315. See Jon Murray, *Reformers Urge State to Freeze Executions: Death Penalty Isn't Evenly Applied, Says a Report by Politicians, Indiana Law Experts*, INDIANAPOLIS STAR, Feb. 20, 2007, at A1.

unlikely to occur.³¹⁶ The General Assembly did, however, review the procedures surrounding executing the severely mentally ill in the summer of 2007. This review was conducted through a summer study commission named after the late State Senator Anita Bowser, who “had a long-time interest in studying whether the death penalty was suitable in any case, but particularly in cases when the defendants were afflicted with either mental illness or mental retardation.”³¹⁷ The Commission held three public hearings during which it heard testimony from mental health professionals, law professors, lawyers, and lay people.³¹⁸ It ultimately recommended, by a 7-2 vote,³¹⁹ legislation that would exempt from the death penalty those suffering from a severe mental illness, narrowly defined as an:

individual who, at the time of the offense, had active symptoms of a severe mental illness that substantially impaired the individual’s capacity to:

- (1) appreciate the nature, consequences, or wrongfulness of the individual’s conduct;
- (2) exercise rational judgment in relation to the individual’s conduct; or
- (3) conform the individual’s conduct to the requirements of the law.

Sec. 5. As used in this chapter, “severe mental illness” means one (1) or more of the following mental disorders or disabilities as diagnosed by psychiatrists or psychologists using their current professional standards:

- (1) Schizophrenia.
- (2) Schizoaffective disorder.
- (3) Bipolar disorder.
- (4) Major depression.
- (5) Delusional disorder.

The term “severe mental illness” does not include a mental disorder or disability manifested primarily by repeated criminal conduct or attributable solely to the acute effects of alcohol or other drugs.³²⁰

The determination would be made by the trial court through pretrial proceeding similar to the exemption for defendants alleged to be mentally retarded.³²¹ However, unlike that statute, which places few restrictions on the procedures by which experts are appointed to examine the defendant or their qualifications, the proposed legislation for the severely mentally ill included detailed requirements and procedures for qualification, selection of the experts, and the type of testing

316. See generally Michael W. Hoskins, *Execution Overshadows Moratorium*, IND. LAW., May 16, 2007, at 1.

317. IND. LEGISLATIVE SERVS. AGENCY, FINAL REPORT OF THE BOWSER COMMISSION 1 (2007), available at <http://www.in.gov/legislative/interim/committee/reports/BCOMAB1.pdf>.

318. *Id.* at 2-3.

319. *Id.* at 1.

320. Proposed IND. CODE § 35-36-10-4-5, <http://www.in.gov/legislative/interim/committee/prelim/BCOM04.pdf> (last visited Feb. 2, 2008).

321. IND. CODE § 35-36-9-2 (2004).

employed.

The evaluation shall include psychological and forensic testing and shall be conducted by a panel of three (3) disinterested psychiatrists or psychologists endorsed by the state psychology board as health service providers in psychology. Each member of the panel shall have formal training in forensic psychiatry or forensic psychology and shall have experience in evaluating the mental status of defendants at the time of their alleged offense. At least one (1) member of the panel must be a psychiatrist. The panel shall be selected as follows:

(1) The defendant shall submit a list of at least five (5) psychiatrists or psychologists qualified under this subsection.

(2) The prosecuting attorney shall submit a list of at least five (5) psychiatrists or psychologists qualified under this subsection.

(3) The court shall select one (1) psychologist or psychiatrist from each list submitted by the defendant and the prosecuting attorney.

(4) The two (2) psychologists, two (2) psychiatrists, or the psychologist and psychiatrist selected by the court from the lists submitted by the defendant and the prosecuting attorney shall select a third psychologist or psychiatrist. The third psychiatrist or psychologist is not required to be a psychiatrist or psychologist named on a list submitted by the defendant or the prosecuting attorney.³²²

Allowing the defense and prosecution to have a say in selecting the experts may reduce the need for each to hire several experts of their own. Moreover, allowing each of the experts selected from the defense and prosecution's lists to select the third expert, which is similar to the procedure used for medical malpractice review panels,³²³ should provide additional legitimacy to the conclusions reached by the experts.

C. Competence to be Executed: Still No Standard/Procedures in Indiana

The work of the Bowser Commission should be commended for taking a forward-looking view and attempting to resolve issues of severe mental illness early in a proceeding rather than allowing a case to proceed for decades when there was no dispute that the defendant was suffering from a severe mental illness.³²⁴ However, it does not address the prospect of a defendant who was not suffering from a severe mental illness at the time of the offense, but later develops one on death row. Since the United States Supreme Court's opinion in

322. Proposed IND. CODE § 35-36-10-6, <http://www.in.gov/legislative/interim/committee/prelim/BCOM04.pdf> (last visited Feb. 2, 2008).

323. IND. CODE § 34-18-10-6 (2004).

324. See Exec. Order No. 05-23 (Ind. 2005), available at http://www.in.gov/gov/files/EO_05-23_Clemency_Arthur_Baird_II.pdf; see also Kevin Corcoran, *Governor Spares Life of Convicted Killer*, INDIANAPOLIS STAR, Aug. 29, 2005.

Ford v. Wainwright,³²⁵ it is clear that the Eighth Amendment prohibits the execution of those insane at the time of their execution, although the standard for assessing competence to be executed remains somewhat of a mystery.³²⁶

Just days before his scheduled execution in January 2007, Norman Timberlake was granted a rare stay of execution in a 3-2 order from the Indiana Supreme Court.³²⁷ At issue was his competence to be executed, which has been difficult to establish under the prevailing *Ford* standard that a person is “unaware of the punishment they are about to suffer and why they are to suffer it.”³²⁸ An independent psychiatrist found that Timberlake suffered from “multiple paranoid delusional beliefs, centered on his conviction that he was being tortured by a computer-driven machine at the behest of prison officials[,]” but nevertheless understood that he was going to be executed and why.³²⁹

In granting a stay, the majority noted that Justice Powell’s formulation of the *Ford* standard has never been squarely adopted by the Supreme Court and that Court would soon revisit the issue with the grant of certiorari in *Panetti v. Quarterman*.³³⁰ Noting the severe restrictions on habeas relief, the court emphasized that it was free to revisit its decisions and decided a stay was appropriate pending a decision in *Panetti*.³³¹

If there is doubt as to the applicable legal precedent, we should be cautious in carrying out the death penalty The potential harm in granting Timberlake a stay of execution and later finding out that the Supreme Court’s decision in *Panetti* was inapplicable to Timberlake is minimal compared to the irreparable harm in denying the stay of execution, allowing Timberlake to be executed, and possibly learning a few months later that Timberlake’s execution may have violated a new Supreme Court interpretation of the Eighth Amendment to prohibit execution of a class of mentally ill persons that included Timberlake.³³²

Chief Justice Shepard dissented, noting that *Panetti*’s petition for certiorari alleged that the Fifth Circuit had failed to follow *Ford* and thus a change in the law “in any way favorable to death row murderers . . . seems so implausible that granting a stay is unjustifiable.”³³³ Similarly, Justice Sullivan dissented because

325. 477 U.S. 399 (1986).

326. Most lower courts have looked to the standard espoused in Justice Powell’s concurring opinion, i.e., whether the person was “unaware of the punishment they are about to suffer and why they are to suffer it.” *Id.* at 422 (Powell, J., concurring); see *Baird v. State*, 833 N.E.2d 28, 32 (Ind. 2005) (Boehm, J., dissenting); Joel Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 39 IND. L. REV. 893, 922-94 (2006).

327. *Timberlake v. State*, 859 N.E.2d 1209, 1213 (Ind. 2007).

328. *Ford*, 477 U.S. at 422 (Powell, J., concurring).

329. *Timberlake*, 859 N.E.2d at 1211.

330. 127 S. Ct. 852 (2007).

331. *Timberlake*, 859 N.E.2d at 1212.

332. *Id.* at 1213.

333. *Id.* at 1214 (Shepard, C.J., dissenting).

he believed the outcome of *Panetti* would not “affect this case because Timberlake rationally understands the reason he is being executed and so would not be entitled to relief even if the proposition advanced by Panetti prevails.”³³⁴

In June, the Supreme Court held in *Panetti* that after a death row prisoner makes a threshold showing, the Eighth Amendment requires “an opportunity to submit psychiatric evidence as a counterweight to the report filed by the court-appointed experts.”³³⁵ The Court further explained that “[e]xpert evidence may clarify the extent to which severe delusions may render a subject’s perception of reality so distorted that he should be deemed incompetent.”³³⁶ The application of *Panetti* to Indiana remains unresolved, however, because Mr. Timberlake died in prison, rendering his case moot.³³⁷ Regardless of what the Supreme Court does in the future with *Ford* and *Panetti*, “nothing prohibits a state from acting more cautiously in applying the death penalty if there is genuine doubt as to the long term viability of the dominant understanding of current precedent from that Court.”³³⁸ However, such a “more cautious approach” seems more likely to come from legislative action than from the Indiana Supreme Court, as suggested by the work of the Bowser Commission when contrasted with the recent decisions of the court, summarized below.

D. Significant Cases

The Indiana Supreme Court, which has mandatory jurisdiction over all capital appeals,³³⁹ issued several opinions in death penalty cases during the survey period.

1. *Change of Judge*.—In *Voss v. State*,³⁴⁰ the Marion County prosecutor sought a change of judge based on the trial court’s prior decisions that had ruled certain aspects of the death penalty statute unconstitutional, media quotations of remarks alleged to be “critical of the death penalty,” and the judge’s previous work as a defense lawyer in death penalty cases where he testified that his representation had been ineffective.³⁴¹ The supreme court rejected each as a basis requiring a change of judge. First, it noted that prior adverse rulings generally do not support an inference of prejudice, and the trial court’s rulings, although later reversed on appeal, “were supported by reasonable legal argument and the applicable law was subject to a good faith difference of opinion at the

334. *Id.* (Sullivan, J., dissenting).

335. *Panetti*, 127 S. Ct. at 2858.

336. *Id.* at 2863.

337. *Timberlake v. State*, 49S00-0606-SD-0023S (November 30, 2007 order finding “the appeal has abated and is now at an end”), available through the clerk of court’s online docket at <http://hats.courts.state.in.us/ISC3RUS/ISC2menu.jsp> (last visited Feb. 3, 2008).

338. *Timberlake*, 858 N.E.2d at 631 (Boehm, J., dissenting).

339. IND. CONST. art. VII, § 4; IND. R. APP. P. 4(A).

340. 856 N.E.2d 1211 (Ind. 2006).

341. *Id.* at 1217-18.

time.”³⁴² Next, the court emphasized that judges will often have personal opinions on an issue but are presumed to set aside those opinions and “impartially follow the law.”³⁴³ The trial court’s comments to the media about the death penalty reflected “concern regarding the necessity for extreme care in judicial administration of death penalty cases, but they do not indicate or suggest that he would hesitate to fully follow the law and impose a sentence of death where appropriate.”³⁴⁴ Finally, the court easily dispatched the suggestion that prior representation of capitally charged defendants provides a rational inference that a judge would be biased and prejudiced in cases involving the death penalty, citing a case that found no bias or prejudice on the basis of a judge’s prior service as the county prosecutor.³⁴⁵

2. *How Long Is Too Long to Try Death Penalty Case?*—In *State v. Azania*,³⁴⁶ the supreme court grappled with a lengthy delay in a capital case involving a 1981 murder of a police officer. The court had twice set aside jury recommendations that the defendant receive the death penalty, and a trial court determined in 2005 that the quarter of a century delay would violate the defendant’s right to a speedy trial and due process if the State continued to pursue a death sentence.³⁴⁷

In a 3-2 decision, the Indiana Supreme Court reversed and held that the State could continue to pursue the death penalty.³⁴⁸ The court began by discussing the many types of delay that may exist in cases generally and capital cases in particular, observing that delay may sometimes “work to the accused’s advantage.”³⁴⁹ It found it unnecessary to determine whether the Speedy Trial Clause of the Sixth Amendment applies to delay after a trial, because such post-trial delay “clearly does implicate the Due Process Clause” of the Fourteenth Amendment, which is assessed by applying the same factors that apply to a speedy trial claim.³⁵⁰ Those factors are “the (1) length of delay, (2) reason for the delay, (3) defendant’s assertion of the speedy trial right, and (4) prejudice to the defendant.”³⁵¹ The court examined the first three of these together and concluded that Azania was responsible for most of the delay that occurred after his trial

342. *Id.* at 1217.

343. *Id.* at 1218.

344. *Id.*

345. *Id.* at 1218-19 (citing *Broome v. State*, 687 N.E.2d 590, 596-97 (Ind. Ct. App. 1997)). *Voss* also found improper the trial court’s appointment of a special judge to decide whether recusal was required and held “[t]he determination of whether disqualification is necessary under Canon 3 [of the Code of Judicial Conduct] must be made by the sitting judge.” *Id.* at 1219-21.

346. 865 N.E.2d 994 (Ind.), *clarified on reh’g*, 875 N.E.2d 701 (Ind. 2007). On rehearing the court clarified that “Azania should be re-sentenced under the post-2002 death penalty statute, but without the availability of [life without parole].” 875 N.E.2d at 705.

347. *Azania*, 865 N.E.2d at 996-97.

348. *Id.* at 1010.

349. *Id.* at 999 (quoting *Barker v. Wingo*, 407 U.S. 514, 521 (1972)).

350. *Id.* at 1000-01 (citing *Barker*, 407 U.S. at 514).

351. *Id.* at 1000 n.15.

because he—not the State—had the burden of going forward in either an appeal or petition for collateral review.³⁵² As to the fourth factor, prejudice, the court reasoned that a jury “will make an appropriate allowance” for the unavailability of mitigating witnesses who had died in the twenty-five years since his first trial.³⁵³ As to the aggravating factors, the State would again have the burden of proving them beyond a reasonable doubt; therefore, the court concluded any difficulty for the defense created by the death of witnesses would pale in comparison to the “far greater difficulty for the State to meet its burden of proof.”³⁵⁴

Justice Boehm and Justice Rucker each wrote dissenting opinions. Justice Boehm acknowledged that the supreme court had not yet entertained a claim that passage of time alone was “sufficient to question whether either retribution or deterrence continues to justify an execution” under *Lackey v. Texas*.³⁵⁵ He therefore grounded his dissent in the Indiana Constitution’s prohibition on cruel and unusual punishment, finding the State should no longer be able to pursue a death sentence when at least fifteen of the twenty-five years of delay “was due to mistakes of others.”³⁵⁶ Justice Rucker focused instead on the trial court’s finding that Azania’s right to present mitigating evidence “would be severely prejudiced” by the lengthy delay.³⁵⁷ Specifically, he observed that “[m]ultiple mitigation witnesses are now deceased,” and it was for a jury—not an appellate court—to determine the importance of their testimony.³⁵⁸

3. *Reviewing Trial Court Findings Against the State.*—Azania was not the only case in which a trial court ruled in favor of a capital charged defendant. In *State v. McManus*,³⁵⁹ the State appealed a post-conviction court’s finding that the defendant was mentally retarded and the imposition of a sentence of life without parole in the place of a death sentence.³⁶⁰ The post-conviction court found by a preponderance of the evidence that McManus met the statutory definition of a “mentally retarded individual,” which is “one who manifests (1) significantly subaverage intellectual functioning, and (2) substantial impairment of adaptive behavior before the age of twenty-two.”³⁶¹ Although the court noted that each of these prongs is a factual determination subject to review under a “clearly erroneous” standard,³⁶² the majority proceeded to review the findings with little deference to the post-conviction court. As to intellectual functioning, the majority parsed the expert testimony, concluding that “[a] careful review of

352. *Id.* at 1003.

353. *Id.* at 1009.

354. *Id.*

355. *Id.* at 1012 (Boehm, J., dissenting) (citing *Lackey v. Texas*, 514 U.S. 1045 (1995)).

356. *Id.* at 1012-13.

357. *Id.* at 1015 (Rucker, J., dissenting).

358. *Id.*

359. 868 N.E.2d 778 (Ind. 2007), *cert. denied*, 128 S. Ct. 1739 (2008).

360. *Id.* at 781.

361. *Id.* at 785 (quoting IND. CODE § 35-36-9-2 (2004)).

362. *Id.*

McManus'[s] testing history alone demonstrates McManus is *not* significantly subaverage as to intellectual functioning. McManus'[s] school history, work history, and life functioning only strengthen this conclusion."³⁶³ Most puzzling, however, the majority concluded, "[p]erhaps most indicative of his functioning and mental capacity, McManus was known by all as an excellent father who ably cared for his two daughters."³⁶⁴ It is unclear how one's parenting ability relates to intellectual functioning. Anyone who has observed a child caring for another child knows they are quite capable, more so than many otherwise high-functioning adults. Moreover, as to adaptive behavior, the majority also undertook an exacting review focusing on McManus's "work history and day-to-day life, both of which illustrate his abilities—not deficits."³⁶⁵ Finding that "McManus does not satisfy the intellectual functioning or adaptive behavior prongs"—which sounds a lot like *de novo* review—the court concluded execution was not prohibited.³⁶⁶

Justice Boehm, joined by Justice Rucker, dissented on the basis that "the majority's review of the evidence does not give sufficient deference to the trial court's finding of mental retardation."³⁶⁷ Specifically, the short but potent dissent noted "the record is replete with conflicts in expert and lay testimony" both to intellectual functioning and adaptive behavior.³⁶⁸ The dissent noted the court had "recently affirmed a finding by a trial court that a defendant was not mentally retarded despite significant evidence suggesting that he was," and concluded that "the clearly erroneous standard of review dictates affirming this trial court's determination as to mental retardation as well."³⁶⁹

CONCLUSION

In short, the survey period was marked largely by stability and consistency. The most significant legislative action was in response to recent judicial opinions and returned matters to the status quo. The vast majority of the judicial opinions applied existing law rather than breaking boldly in new directions. Even the significant reversals were grounded in conservative principles of statutory construction or a defendant's right to a fair trial. Finally, Indiana's death penalty jurisprudence continued to be made in largely 3-2 decisions, although the prospect for significant legislative change, occasioned either by the ABA death penalty assessment or the Bowser Commission, appears plausible in the coming months and years.

363. *Id.* at 787.

364. *Id.*

365. *Id.* at 789.

366. *Id.*

367. *Id.* at 792 (Boehm, J., dissenting).

368. *Id.* at 792-93 (citing *Pruitt v. State*, 834 N.E.2d 90, 104 (Ind. 2005)).

369. *Id.* at 793.

RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

JEFF PAPA*

INTRODUCTION

The Indiana Rules of Evidence (“Rules”) went into effect in 1994. Each year since that time, court decisions and statutory changes have refined, defined, and changed the interpretation of most of these Rules in many minor and major ways. This year was no exception, with several clarifying or new interpretations of the existing language of the Rules.

This Article explains developments in Indiana evidence law during the period between October 1, 2006, and September 30, 2007. The discussion topics are arranged in the same subject order as the Rules.

I. SCOPE OF THE RULES

A. In General

Rule 101(a) states that the Rules apply to all court proceedings in Indiana except when “otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court.”¹ If the Rules do not “cover a specific evidence issue, common or statutory law shall apply.”² This interaction of authorities leaves room for debate on some aspects of the Rules.

According to the Indiana Supreme Court, Rule 101(a) provides that any conflicting statute yields to the Rules.³

B. Rules Do Not Apply in Probation Proceedings

In *Carden v. State*,⁴ Carden appealed the revocation of his probation, based in part on the lack of trustworthiness of the State’s testimony.⁵ Carden argued that the only evidence that he had violated the terms of his probation was testimony by his probation officer that the address of Carden’s girlfriend was near a child care facility.⁶

Rule 101(c) states that the rules, “other than those with respect to privileges, do not apply in . . . [p]roceedings relating to . . . probation,”⁷ and prior case law

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1. IND. R. EVID. 101(a).

2. *Id.*

3. See *Williams v. State*, 681 N.E.2d 195, 200 n.6 (Ind. 1997) (citing *Harrison v. State*, 644 N.E.2d 1243, 1251 n.14 (Ind. 1995)); *Humbert v. Smith*, 664 N.E.2d 356, 357 (Ind. 1996) (citing *Harrison*, 644 N.E.2d at 1251 n.14).

4. 873 N.E.2d 160 (Ind. Ct. App. 2007).

5. *Id.* at 161.

6. *Id.* at 162.

7. IND. R. EVID. 101(c)(2).

provides that “[t]here is no right to probation.”⁸ However, the court noted that “[t]his does not mean that hearsay evidence may be admitted willy-nilly in a probation revocation hearing.”⁹ The court held that the probation officer’s testimony did “not have a substantial . . . [degree] of trustworthiness.”¹⁰ The admission of this evidence at the probation hearing was found to have been “fundamental error,” and “so prejudicial” that the court reversed the revocation of Carden’s probation.¹¹

C. Rules Do Not Apply in Sentencing Proceedings

In *Hines v. State*,¹² Hines argued that the court improperly enhanced his sentence by considering a statement Hines had made regarding uncharged molestation he had perpetrated on his own daughter.¹³ Because this was uncharged conduct admitted during a pretrial psychosexual analysis, Hines claimed using this information to enhance his sentence violated Rule 404(b).¹⁴

Rule 404(b) states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”¹⁵ However, the court pointed out that Rule 101(c) states that the Rules do not apply in sentencing proceedings.¹⁶ Thus, the court found it was not improper for the trial court to consider Hines’s admission of uncharged molestation as an aggravating factor.¹⁷

D. Timeliness of Objections

In *Rich v. State*,¹⁸ Rich objected at trial during the testimony of Detective Daniel.¹⁹ Rich contended that police officers had stopped him without “reasonable suspicion . . . [of] criminal activity,” and therefore the evidence should have been suppressed under the Fourth Amendment.²⁰ The trial court held that Rich waived this argument because he failed to raise the objection prior to the beginning of Deputy Gray’s testimony.²¹

8. *Carden*, 873 N.E.2d at 163 (citing *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007)).

9. *Id.* (alteration in original) (quoting *Reyes*, 868 N.E.2d at 440).

10. *Id.* at 164.

11. *Id.* at 164-65; accord *Lightcap v. State*, 863 N.E.2d 907, 910 (Ind. Ct. App. 2007) (holding that the court need not determine applicability of Rule 804(b)(1) because the matter in question was a probation proceeding and the normal rules against hearsay did not apply).

12. 856 N.E.2d 1275 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 459 (Ind. 2007).

13. *Id.* at 1278 n.2.

14. *Id.* at 1281.

15. IND. R. EVID. 404(b).

16. *Hines*, 856 N.E.2d at 1281 (citing IND. R. EVID. 101(c)).

17. *Id.*

18. 864 N.E.2d 1130 (Ind. Ct. App. 2007).

19. *Id.* at 1131.

20. *Id.* at 1132.

21. *Id.*

The court disagreed with this interpretation.²² It noted that Rule 103(a)(1) provides that a party must make “‘a timely objection . . . , stating the specific ground of objection,’”²³ and that an objection is normally considered timely if it is given prior to the answer being given.²⁴ Because “Rich objected before Deputy Gray testified about the elements of the crime charged,” the objection was timely.²⁵ The court could find no supporting authority for the State’s contention that an objection is untimely “just because a witness has begun testifying,”²⁶ and held that the remainder of the Deputy’s testimony should be suppressed under Rich’s Fourth Amendment argument.²⁷

E. Formal Offer of Proof

In *Catt v. Skeans*,²⁸ Catt was asked by his attorney on direct examination about his educational background.²⁹ The trial court sustained an objection by Skeans to this line of questioning after Catt’s attorney stated that he anticipated Skeans would ask for a substantial verdict.³⁰ Catt’s attorney continued the direct examination of Catt without making a formal offer of proof regarding Catt’s finances.³¹

On appeal, Catt contended a formal offer of proof was not necessary because the content of his attempted testimony was obvious “from the context of the question.”³² The court noted that the only relevant question in the record was one inquiring about Catt’s educational background, which gives the court no indication of his financial status at the time of trial.³³ The court held that Catt had failed to make a formal offer of proof, and therefore waived this argument.³⁴

22. *Id.*

23. *Id.* (omission in original) (quoting IND. R. EVID. 103(a)(1)).

24. *Id.* (citing *Fleener v. State*, 656 N.E.2d 1140, 1141 (Ind. 1995)).

25. *Id.*

26. *Id.*

27. *Id.* at 1133; *see also* *Espinoza v. State*, 859 N.E.2d 375, 384 (Ind. Ct. App. 2006) (relying on IND. R. EVID. 103(a) to hold that an objection which is not specific enough does not preserve the issue upon appeal).

28. 867 N.E.2d 582 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 204 (Ind. 2007).

29. *Id.* at 586.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 586-87.

34. *Id.* at 587; *see also* *In re Commitment of A.W.D.*, 861 N.E.2d 1260, 1263 n.2 (Ind. Ct. App.) (noting that failure to object at trial normally results in waiver of appeal under Rule 103(a), but examining the issue raised because it could have implicated A.W.D.’s “fundamental right to a fair trial”), *trans. denied*, 869 N.E.2d 460 (Ind. 2007).

F. Judicial Notice

In *Rosendaul v. State*,³⁵ Rosendaul claimed the trial court had abandoned its neutral role in the proceedings and gave him an unfair trial.³⁶ A letter claiming responsibility for a crime had been delivered to local law enforcement authorities, using a civilian style of dating.³⁷ At trial, Rosendaul claimed that since leaving the military, he never under any circumstances deviated from using the military style of dating.³⁸

The trial court took judicial notice of the fact that Rosendaul had submitted letters and filings with the court that did not use the military style of dating.³⁹ On appeal, the court noted that Rule 201 allows a court to take judicial notice of a fact, whether or not requested by a party.⁴⁰ It also noted that a trial court can take judicial notice of facts in a current case, and those facts create a rebuttable presumption which the defendant must dispute.⁴¹ Here, the court properly took notice of both Rosendaul's filings, as well as the style of dating he used.⁴² The court also noted that Rule 614(b) states that the "court may interrogate witnesses, whether called by itself or by a party."⁴³

II. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

In *Kelley v. Tanoos*,⁴⁴ Tanoos asked the supreme court to review a decision in which the Indiana Court of Appeals had decided that even though one of the required elements of defamation, damages, was missing, granting summary judgment in favor of Tanoos was proper.⁴⁵ In defamation actions, "damages are presumed and . . . even rebutted presumptions are given continuing effect."⁴⁶

35. 864 N.E.2d 1110 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 204 (Ind. 2007).

36. *Id.* at 1115.

37. *Id.* at 1112.

38. *Id.*

39. *Id.* at 1116.

40. *Id.* (citing IND. R. EVID. 201).

41. *Id.*; *see also* *City of Crown Point v. Misty Woods Props., LLC*, 864 N.E.2d 1069, 1074 n.2 (Ind. Ct. App. 2007) (noting that a court may take judicial notice of law under Rule 201(b), including "ordinances of municipalities"). Rule 201(b) states that "[a] court may take judicial notice of law. Law includes . . . codified ordinances of municipalities." IND. R. EVID. 201(b).

42. *Rosendaul*, 864 N.E.2d at 1116. Rule 201(c) states that a "court may take judicial notice, whether requested or not." IND. R. EVID. 201(c). Rule 201(a) states:

[A] court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

IND. R. EVID. 201(a).

43. *Id.* at 1115 (quoting IND. R. EVID. 614(b)).

44. 865 N.E.2d 593 (Ind. 2007).

45. *Id.* at 597.

46. *Id.* (citing IND. R. EVID. 301). Rule 301 states that "[a] presumption shall have continuing

III. RELEVANCE AND PROBATIVE VERSUS PREJUDICIAL

A. Irrelevant Evidence

In *Schumm v. State*,⁴⁷ Schumm argued that the trial court had improperly allowed irrelevant evidence when it allowed the State to cross-examine Schumm regarding its allegation that Schumm had asked a Deputy Prosecutor how to make the matter “go away.”⁴⁸

Schumm argued that regardless if he made the statement, that information was irrelevant to deciding his case.⁴⁹ According to Rule 401, “[e]vidence is relevant if it has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’”⁵⁰ The court also noted that Rule 403 states that “[e]vidence which is not relevant is not admissible.”⁵¹ The court agreed with Schumm that his statement made it no more or less probable that he operated his vehicle without a working taillight.⁵²

In *Stowers v. Clinton Central School Corp.*,⁵³ Stowers argued an athletic release form that did not mention the word negligence should not have been admitted at trial because it was not relevant evidence under Rule 401.⁵⁴ The court held that even without the word negligence, the form was relevant to the issue of incurred risk, and therefore admissible.⁵⁵

B. Probative Value Versus Unfair Prejudice

In *Baer v. State*,⁵⁶ Baer appealed his murder conviction in part based on his contention that the trial court had improperly admitted excerpts of two phone calls Baer made to his sister from jail.⁵⁷ Baer argued that the unfair prejudice of allowing the calls “outweighed the probative value,” and therefore violated Rule

effect even though contrary evidence is received.” IND. R. EVID. 301; *see also* *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 986 (Ind. 2006) (holding that the Rule 301 “judicial exception” does not permit a court to make a decision contrary to Rule 301, and that to the extent previous cases “may be read to hold that it is improper to give a jury instruction regarding the statutory presumption after that presumption is rebutted, they are disapproved”).

47. 866 N.E.2d 781 (Ind. Ct. App.), *aff’d on reh’g*, 868 N.E.2d 1202 (Ind. Ct. App. 2007).

48. *Id.* at 797-98.

49. *Id.* at 798.

50. *Id.* (quoting IND. R. EVID. 401).

51. *Id.* (quoting IND. R. EVID. 403).

52. *Id.* The court also noted that Rule 608(b) prohibits attacking the witness’s credibility by inquiring into specific instances or using extrinsic evidence. *Id.* (citing IND. R. EVID. 608(b)).

53. 855 N.E.2d 739 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 454 (Ind. 2007).

54. *Id.* at 748.

55. *Id.* at 748-49.

56. 866 N.E.2d 752 (Ind. 2007), *cert. denied*, 128 S. Ct. 1869 (2008).

57. *Id.* at 761-62.

403,⁵⁸ which states that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”⁵⁹

After noting that Baer had ample notice that such calls might be recorded by the authorities,⁶⁰ the court reiterated that the content of the calls included discussions of what fabrications Baer should present at his psychological examination to bolster his case that he was mentally ill.⁶¹ Because the calls involved his efforts to create a case for the defense of guilty but mentally ill, the calls were highly probative and relevant.⁶² They were also prejudicial, but not “unfairly prejudicial.”⁶³ The court held that the high probative value of the calls was not outweighed by the resulting prejudice.⁶⁴

In *Cox v. State*,⁶⁵ Cox argued that the trial court had violated Rules 403 and 404(b) when it allowed a witness to testify that Cox had lost physical custody of two children in the past.⁶⁶ Although Rule 404(b) provides generally that “[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith,” this rule contains an exception allowing admissibility if used “for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”⁶⁷

The State’s theory of the case had been that Cox murdered the victim in order to prevent him from gaining custody of a child she had with the victim.⁶⁸ Because the evidence was offered to prove motive, rather than action in conformity with past behavior, it did not violate Rule 404(b).⁶⁹ Furthermore, Cox’s ex-husband had testified, without objection, on cross-examination that he had custody of the children.⁷⁰

58. *Id.* at 763.

59. *Id.* (quoting IND. R. EVID. 403).

60. *Id.* at 762.

61. *Id.* at 763.

62. *Id.*

63. *Id.*

64. *Id.*; see also *Dixson v. State*, 865 N.E.2d 704 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 208 (Ind. 2007). In *Dixson*, the court held that testimony regarding the defendant’s potential infidelity was at most harmless error in his murder trial. *Id.* at 710. *Dixson*’s location on the night in question was relevant to the murder charge, and the probative value of this information was not clearly outweighed by the prejudicial nature of the evidence. *Id.*

65. 854 N.E.2d 1187 (Ind. Ct. App. 2006).

66. *Id.* at 1196.

67. IND. R. EVID. 404(b).

68. *Cox*, 854 N.E.2d at 1197.

69. *Id.*

70. *Id.*

C. Use of Related Extrinsic Evidence

In *Matthews v. State*,⁷¹ Matthews appealed based on his contention that the trial court had violated Rule 404(b) when it admitted testimony from two witnesses who each stated that Matthews had claimed to have killed the victim, advised the witness to keep quiet, and fired shots at their vehicle.⁷² Matthews claimed this evidence should have been prohibited by Rule 404(b), which states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes.”⁷³

In order to determine whether such evidence was admissible under Rule 404(b), the court considered whether the evidence of other crimes, wrongs, or bad acts was relevant to an issue other than Matthews’s propensity to commit the charged act. The court then balanced the probative value of the evidence against its prejudicial effect pursuant to [Rule] 403.⁷⁴ The court found that threats by the accused against prosecution witnesses are attempts to conceal or suppress relevant evidence, and therefore the threats in this case were properly admitted for a purpose other than merely to show Matthews’s propensity to commit crime.⁷⁵

In *McDowell v. State*,⁷⁶ McDowell appealed her conviction for manslaughter, claiming that recordings of phone messages she had left for the victim were evidence of unrelated prior bad acts and should have been excluded under Rule 404.⁷⁷ McDowell’s defense at trial had been that she was afraid of the victim and he had abused her for years.⁷⁸

On the recordings, however, McDowell repeatedly threatened the victim and seemed unafraid of him.⁷⁹ She also suggested in the recordings that the victim should adopt her daughter because he was a good father figure to her.⁸⁰ The court found that the tapes had probative value because they questioned the truth of McDowell’s claims that the victim had abused her, and that the prejudicial effect of their admission did not outweigh this probative value.⁸¹

In *Burnside v. State*,⁸² Burnside argued that the evidence showing that he was not licensed to carry the handgun with which he killed the victim was evidence of another crime, wrong, or act and should have been excluded under Rule

71. 866 N.E.2d 821 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).

72. *Id.* at 824.

73. *Id.* (quoting IND. R. EVID. 404(b)).

74. *Id.* (citing *Bassett v. State*, 795 N.E.2d 1050, 1053 (Ind. 2003)).

75. *Id.* (citing *Johnson v. State*, 472 N.E.2d 892, 910 (Ind. 1985)).

76. 872 N.E.2d 689 (Ind. Ct. App. 2007), *trans. granted*, 878 N.E.2d 218 (Ind. 2007), and *vacated*, 885 N.E.2d 1260 (Ind. 2008).

77. *Id.* at 692-93.

78. *Id.* at 693.

79. *Id.*

80. *Id.*

81. *Id.*

82. 858 N.E.2d 232 (Ind. Ct. App. 2006).

404(b).⁸³ The court, however, pointed out that Rule 404(b) does not bar evidence of intrinsic uncharged criminal acts.⁸⁴ Because Burnside's use of an unlicensed handgun was an integral part of the charged offense, Rule 404(b) did not bar use of this evidence.⁸⁵

D. Reverse 404(b) Evidence

In *Kien v. State*,⁸⁶ Kien challenged the judgment of a postconviction court, which had denied his request for postconviction relief.⁸⁷ Kien argued that the trial court had improperly excluded his offered evidence that his former girlfriend acted in vindictive ways against other former romantic interests.⁸⁸ Kien's theory was that his former girlfriend had conspired with her children to fabricate the child molesting charges against him.⁸⁹ The court noted that while 404(b) is normally used by defendants to exclude evidence of their own prior bad acts, prior bad acts of another party may be admitted under a "reverse 404(b)" if evidence of those acts tend to negate the guilt of the defendant and one of the 404(b) exceptions applies.⁹⁰

In this case, Kien's former girlfriend was not the one who made the accusations of child molestation, and she did not testify at Kien's trial or postconviction relief hearing.⁹¹ Even if one of the exceptions applied, the Rule 403 balancing test must still be applied.⁹² The court noted that evidence of an extrinsic act that is too remote or unrelated may be rendered inadmissible by the 403 balancing test.⁹³ In this case, the court found that the prior acts of Kien's former girlfriend were too remote (more than ten years earlier) and too unrelated to survive the Rule 403 balancing test.⁹⁴

E. Rule 608 Exception to Rule 404(a)

In *Beaty v. State*,⁹⁵ Beaty argued that he should have been allowed to introduce evidence at his trial for theft that another defendant, Hohler, had previously stolen from the same company.⁹⁶ The court held that Beaty was

83. *Id.* at 236.

84. *Id.* at 242 (citing *Lee v. State*, 689 N.E.2d 435, 439 (Ind. 1997)).

85. *Id.*

86. 866 N.E.2d 377 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 207 (Ind. 2007).

87. *Id.* at 379.

88. *Id.* at 382.

89. *Id.*

90. *Id.*

91. *Id.* at 383.

92. *Id.*

93. *Id.* at 383-84 (citing 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE § 404.212 (2d ed. 1995)).

94. *Id.* at 384.

95. 856 N.E.2d 1264 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 448 (Ind. 2007).

96. *Id.* at 1268.

simply trying to introduce this evidence in order to demonstrate that it was likely Hohler also committed this theft.⁹⁷ Rule 404(a) prohibits such evidence, “except . . . [e]vidence of the character of a witness, as provided in Rules 607, 608 and 609.”⁹⁸

The court examined these exceptions to Rule 404(a) in turn.⁹⁹ Rule 607 simply states that any party may attack the credibility of a witness.¹⁰⁰ Rule 609 deals with impeachment of a witness by evidence the witness has been convicted of certain crimes, and there was no evidence that the accused prior conduct had resulted in convictions.¹⁰¹

Rule 608(a) allows attack upon the credibility of a witness in the form of an opinion or reputation, subject to certain limitations.¹⁰² The proffered evidence in this case was not offered in the form of an opinion or reputation, and therefore Rule 608(a) did not provide any exception to the general prohibition of 404(a) against introducing evidence of prior bad acts.¹⁰³

The court also examined whether the testimony should have been allowed under the Rule 608(b) exception to Rule 404(a).¹⁰⁴ Rule 608(b) holds that a witness’s credibility may not be attacked by extrinsic evidence “other than conviction of a crime as provided in Rule 609,” but may be examined in certain circumstances of cross-examination regarding the truthfulness of the witness being cross-examined.¹⁰⁵ Because Hohler did not testify regarding the truthfulness of another witness, the Rule 608(b) exception would also not apply.¹⁰⁶

F. Mediation Confidentiality and Rule 408

In *Gast v. Hall*,¹⁰⁷ the plaintiffs argued that the trial court improperly refused

97. *Id.*

98. *Id.* (omission and alteration in original) (quoting IND. R. EVID. 404(a)).

99. *See id.* at 1268-69.

100. *Id.* at 1268 (citing IND. R. EVID. 607). Rule 607 states: “The credibility of a witness may be attacked by any party, including the party calling the witness.” IND. R. EVID. 607.

101. *Beaty*, 856 N.E.2d at 1268 (citing IND. R. EVID. 609). Rule 609 states that for attacking the credibility of a witness, evidence of *conviction* of a “crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.” IND. R. EVID. 609(a).

102. *Beaty*, 856 N.E.2d at 1268 (citing IND. R. EVID. 608(a)).

103. *Id.* at 1269.

104. *Id.*

105. IND. R. EVID. 608(b). Rule 608(b) states that specific instances may be inquired into “on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.” *Id.*

106. *Beaty*, 856 N.E.2d at 1269.

107. 858 N.E.2d 154 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 459 (Ind. 2007).

evidence of an affidavit.¹⁰⁸ The trial court based its exclusion of this evidence on Alternative Dispute Resolution Rule 2.11, which is in turn based on Rule 408.¹⁰⁹ The trial court had held that the prohibited portions of the affidavit would have violated the privilege of confidentiality of mediation if introduced.¹¹⁰ Alternative Dispute Resolution Rule 2.11 states that “[m]ediation shall be regarded as settlement negotiations as governed by Ind[iana] Evidence Rule 408.”¹¹¹

Rule 408 provides that “[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in . . . attempting to [settle] a claim,” as well as conduct or statements made in compromise negotiations, are not admissible.¹¹² However, Rule 408 goes on to state that it does not require exclusion where “the evidence is offered for another purpose.”¹¹³ The court held that because the proffered evidence was to be used to prove the testamentary capacity of a witness for a later will contest, rather than the validity or invalidity of the claim in the first will contest, the evidence related to an entirely different claim, and “Rule 408 did not bar this evidence because it related to settlement discussions that involved a different claim than the one at issue in the current trial.”¹¹⁴

G. Admissibility of Pretrial Statement to Police Officers

In *Green v. State*,¹¹⁵ Green argued that the trial court should have excluded evidence of his attempt to reach a deal with police officers on his punishment prior to Green being charged with any crime.¹¹⁶ Green did make a deal with police officers and was the beneficiary of that bargain, but this was done prior to Green being charged.¹¹⁷ Rule 410 provides that “[e]vidence of a plea of guilty or admission of the charge which was later withdrawn, . . . or of an offer so to plead to the crime charged or any other crime . . . is not admissible in any civil or criminal action.”¹¹⁸

The court noted that while statements made by defendants during plea negotiations are generally inadmissible,¹¹⁹ in order “to qualify as a privileged communication, a statement must meet two requirements: (1) the defendant must

108. *Id.* at 160.

109. *Id.* at 161.

110. *Id.*

111. *Id.* (quoting IND. R. A.D.R. 2.11).

112. IND. R. EVID. 408.

113. *Id.*

114. *Gast*, 858 N.E.2d at 161-62 (quoting *Broadcort Capital Corp. v. Summa Med. Corp.*, 972 F.2d 1183, 1194 (10th Cir. 1992)).

115. 870 N.E.2d 560 (Ind. Ct. App.), *opinion vacated*, 878 N.E.2d 215 (Ind.), *and order vacated*, 877 N.E.2d 467 (Ind. 2007).

116. *Id.* at 565.

117. *Id.* at 566.

118. IND. R. EVID. 410.

119. *Green*, 870 N.E.2d at 565 (citing *Chase v. State*, 528 N.E.2d 784, 786 (Ind. 1988)).

have been charged with a crime at the time of the statement, and (2) the statement must have been made to someone with authority to enter into a binding plea agreement.”¹²⁰ Green’s statement was not privileged because he had not yet been charged with a crime, and therefore was not engaged in plea negotiations.¹²¹

H. Rape Shield Issues

In *McVey v. State*,¹²² McVey challenged his child molestation conviction, in part because the trial court had excluded the victim’s prior sexual history with another man and therefore violated McVey’s Sixth Amendment rights.¹²³ Rule 412 prohibits introduction of the victim’s past sexual conduct, with a few narrow exceptions: “[E]vidence of the victim’s or of a witness’s past sexual conduct with the defendant” or evidence that someone other than the defendant committed the charged act.¹²⁴

In order to show a violation of the Sixth Amendment, a defendant must show he was prohibited from “otherwise appropriate cross-examination.”¹²⁵ While Rule 412 allows for evidence of the victim’s or witness’s past sexual conduct to show someone other than the defendant committed the charged acts, the evidence McVey sought to offer did not meet this requirement.¹²⁶ McVey had been accused of molesting the victim between 1998 and 2001.¹²⁷ The victim had a physical exam in February 2002, which led to McVey’s convictions.¹²⁸ The evidence of the victim’s sexual contact with a third party which McVey sought to introduce regarded occurrences in June 2002, well after the physical exam and McVey’s alleged molestation of the victim.¹²⁹ Therefore, the proffered evidence would not have had a bearing on the physical exam or occurrences for which McVey was convicted.¹³⁰

In *In re D.H.*,¹³¹ a mother challenged the determination by the trial court that her children were Children in Need of Services (“CHINS”).¹³² At trial, several pieces of potential evidence had been barred from exploration under Rule 412’s prohibition on evidence regarding the victim’s past sexual history.¹³³

On appeal, the court noted that the Rape Shield Statute and Rule 412 both

120. *Id.* at 565-66 (citing *Gilliam v. State*, 650 N.E.2d 45, 49 (Ind. Ct. App. 1995)).

121. *Id.* at 566.

122. 863 N.E.2d 434 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).

123. *Id.* at 443.

124. *Id.* (quoting IND. R. EVID. 412).

125. *Id.* (citing *Davis v. State*, 749 N.E.2d 552, 554 (Ind. Ct. App. 2001)).

126. *Id.* at 445.

127. *Id.* at 444.

128. *Id.*

129. *Id.*

130. *Id.*

131. 859 N.E.2d 737 (Ind. Ct. App. 2007).

132. *Id.* at 738.

133. *Id.* at 740-41.

“expressly appl[y] to prosecutions for sex crimes.”¹³⁴ The court noted that previous authority held that criminal proceedings and parental termination proceedings are very different in nature and one is based upon guilt or innocence, while the other is based upon the best interests of the child.¹³⁵ The trial court abused its discretion in excluding this evidence, but the error was found to be harmless.¹³⁶

I. Proof of Medical Expenses

In *Wolfe v. Estate of Custer*,¹³⁷ Wolfe claimed that the evidence against him was insufficient to support the judgment because the plaintiffs did not present evidence showing the medical expenses in question were necessary.¹³⁸ Rule 413 states that “[s]tatements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements shall constitute prima facie evidence that the charges are reasonable.”¹³⁹

In this case, a summary of medical expenses had been admitted into evidence.¹⁴⁰ Rule 413 generates some presumption that the expenses were reasonable, normal, and necessary.¹⁴¹ If a party opposes this data, he or she may offer evidence to the contrary, including expert testimony.¹⁴² Wolfe did not present any evidence in opposition to the medical summary, and therefore the evidence was not insufficient to support the verdict against Wolfe.¹⁴³

J. Admission of Observed Driving Prior to Reckless Homicide Accident

In *Wages v. State*,¹⁴⁴ the court examined whether a defendant’s erratic driving immediately preceding an accident can be considered when deciding whether the defendant’s driving was reckless or merely negligent.¹⁴⁵ The court determined that the defendant’s final maneuver does not necessarily have to be considered in complete isolation.¹⁴⁶ The court further stated that Rule 404(b) permits the

134. *Id.* at 741 (citing IND. CODE § 35-37-4-4 (2004); IND. R. EVID. 412).

135. *Id.* (citing *In re J.Q.*, 836 N.E.2d 961, 964 n.1 (Ind. Ct. App. 2005)).

136. *Id.*

137. 867 N.E.2d 589 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007).

138. *Id.* at 595.

139. *Id.* at 600 (quoting IND. R. EVID. 413).

140. *Id.*

141. *See* IND. R. EVID. 413 (“Such statements shall constitute prima facie evidence that the charges are reasonable.”).

142. *Wolfe*, 867 N.E.2d at 600 (citing *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 277-78 (Ind. 2003)).

143. *Id.* at 601.

144. 863 N.E.2d 408 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).

145. *Id.* at 409.

146. *Id.* at 411.

admission of such evidence in reckless homicide prosecutions.¹⁴⁷

IV. IMPEACHMENT

A. *Use of Document to Refresh Memory*

In *Gault v. State*,¹⁴⁸ Gault appealed his conviction in part because his defense counsel had not been allowed to review a police report used by a testifying officer to refresh his recollection during cross examination.¹⁴⁹ Defense counsel had asked for, and been denied, a few minutes to review the report.¹⁵⁰ The court agreed with the State that the document was not discoverable, and therefore Gault had no right to review it.¹⁵¹

On appeal, Gault argued that he should have been allowed to review the document based on Rule 612.¹⁵² Rule 612 states that if “a witness uses a writing or object to refresh the witness’s memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.”¹⁵³ The Rule goes on to say that a party entitled to such production is also “entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.”¹⁵⁴

Gault argued that because the police officer was serving as the State’s witness, Gault was the adverse party and therefore should have been entitled to inspect the report.¹⁵⁵ The court disagreed, holding that because this was cross-examination, the State was an adverse party.¹⁵⁶ Because Gault was not adverse for purposes of Rule 612, he had no right to review the document.¹⁵⁷

The most recent development, a ruling by the Indiana Supreme Court handed down outside this survey period, however, held otherwise.¹⁵⁸ In its opinion the court held that Gault *was* an adverse party and should have been allowed to see the report.¹⁵⁹

147. *Id.*

148. 861 N.E.2d 728 (Ind. Ct. App. 2007), *trans. granted*, 869 N.E.2d 457 (Ind. 2007), and *aff’d in part and vacated in part*, 878 N.E.2d 1260 (Ind. 2008).

149. *Id.* at 733.

150. *Id.*

151. *Id.*

152. *Id.*

153. IND. R. EVID. 612(a).

154. IND. R. EVID. 612(c).

155. *Gault*, 861 N.E.2d at 733.

156. *Id.* at 734.

157. *Id.*

158. *Gault v. State*, 878 N.E.2d 1260, 1266 (Ind. 2008).

159. *Id.*

B. Impeachment with Evidence of Prior Conviction

In *Outback Steakhouse v. Markley*,¹⁶⁰ Outback claimed that opposing counsel had made material misrepresentations at trial which warranted relief from judgment.¹⁶¹ Bruce McLaren appeared as a witness at trial.¹⁶² Trial counsel for Markley, Alexander, informed the court and Outback's counsel prior to this testimony that McLaren had been indicted for federal wire fraud two weeks earlier and that Alexander was representing McLaren in that case.¹⁶³ The trial court determined that, although wire fraud is a crime of dishonesty, a mere indictment is not an impeachable event under Rule 609(a) because 609(a) requires an actual conviction.¹⁶⁴

After conclusion of the trial, Outback discovered that McLaren had pled guilty to the charges prior to testifying in the Outback case.¹⁶⁵ Outback claimed that a guilty plea is the same as a conviction for purposes of Rule 609(a).¹⁶⁶ However, the court agreed with the Markleys that a guilty plea may be withdrawn at any time before it is accepted by the court, and since McLaren's plea had not yet been accepted, it was not the equivalent of a conviction under Rule 609(a).¹⁶⁷

C. Use of Leading Questions on Direct Examination

In *Vance v. State*,¹⁶⁸ Vance contended that the trial court had improperly allowed the prosecutor to ask a leading question on direct examination.¹⁶⁹ Rule 611(c) states that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony."¹⁷⁰

The court pointed out that while leading questions are not generally allowed on direct examination, a trial court may allow such questioning and such a use is reviewable only for abuse of discretion.¹⁷¹ The court also noted that a leading question may be an assertion of fact which the questioner would like confirmed or may embody a material fact and solicit a conclusive yes or no answer.¹⁷²

At trial, the prosecutor asked the victim if she had lost consciousness due to

160. 856 N.E.2d 65 (Ind. 2006).

161. *Id.* at 83.

162. *Id.* at 84.

163. *Id.*

164. *Id.* at 84-85 (citing IND. R. EVID. 609(a)). Rule 609(a) states that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted." IND. R. EVID. 609(a).

165. *Markley*, 856 N.E.2d at 84.

166. *Id.*

167. *Id.* at 84-85.

168. 860 N.E.2d 617 (Ind. Ct. App. 2007).

169. *Id.* at 618.

170. IND. R. EVID. 611(c).

171. *Vance*, 860 N.E.2d at 619 (citing *Doerner v. State*, 500 N.E.2d 1178, 1182 (Ind. 1986)).

172. *Id.* (citing *Cook v. State*, 133 N.E. 137 (Ind. 1921)).

the defendant's actions.¹⁷³ Vance's objection to this leading question was overruled.¹⁷⁴ The court found that while this questioning did embody a material fact and require a yes or no answer, the testimony was merely cumulative of other testimony that she had been choked unconscious by the defendant.¹⁷⁵ Any error was found to be cumulative and harmless.¹⁷⁶

V. OPINIONS AND EXPERT TESTIMONY

In *Meister v. State*,¹⁷⁷ Meister's mother appealed the forfeiture of her truck due to its involvement in a drug arrest of her son, Meister.¹⁷⁸ Police Captain Smith had administered a field test and found that a substance in the vehicle was methamphetamine.¹⁷⁹ Meister objected to the use of the field test to prove the identity of the substance and claimed the test was just a presumptive field test.¹⁸⁰

Captain Smith had testified that he had drug enforcement training, including drug recognition training.¹⁸¹ He explained that he had been trained in the use of the field test and he explained how the test functioned.¹⁸² He also testified that he had used this test on many previous occasions and the results had been accurate.¹⁸³ He concluded his testimony by stating that the test on the substance found in the vehicle was positive for methamphetamine.¹⁸⁴

The trial court relied upon its finding that the field test was reliable as required by Rule 702.¹⁸⁵ Rule 702 states:

- (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
- (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.¹⁸⁶

The court noted that in *Burkett v. State*, a field test administered by an officer had been found reliable because the officer testified that "(1) he had been trained

173. *Id.* at 620.

174. *Id.*

175. *Id.*

176. *Id.*

177. 864 N.E.2d 1137 (Ind. Ct. App. 2007), *trans. denied*, 878 N.E.2d 214 (Ind. 2007), and *petition for cert. filed*, 76 U.S.L.W. 3512 (U.S. Jan. 7, 2008) (No. 07-1167).

178. *Id.* at 1139.

179. *Id.* at 1140.

180. *Id.* at 1146.

181. *Id.*

182. *Id.* at 1147.

183. *Id.*

184. *Id.*

185. *Id.* at 1146.

186. IND. R. EVID. 702.

to administer the field test; (2) he followed the proper procedures for the test; (3) explained how the field test worked . . . ; and (4) the field test was used routinely by the Sheriff's Department."¹⁸⁷ Based on the similar testimony offered by Captain Smith, the court found that the trial court had not abused its discretion in allowing the results of the field test as evidence.¹⁸⁸

In *Randles v. Indiana Patient's Compensation Fund*,¹⁸⁹ a key issue at trial had been at what point in time (and in which order) a mother and her new child had died around the time of childbirth.¹⁹⁰ Dr. Ballard had testified that the mother was likely alive at the time the baby was delivered.¹⁹¹

On appeal, Randles argued that the determination by the court that the baby was born before the mother died was clearly erroneous.¹⁹² However, the court noted that "Dr. Ballard is a board certified obstetrician gynecologist who has delivered several thousand babies. Dr. Ballard is an expert qualified to give an opinion as to whether her patient was dead or alive,"¹⁹³ and found the trial court's determination had not been clearly erroneous.¹⁹⁴

In *Shady v. Shady*,¹⁹⁵ Samer Shady appealed the decision of the trial court which granted custody of his child to the child's mother and allowed for only supervised visitation based on the trial court's finding that Samer Shady posed a potential risk of abducting the child to Egypt.¹⁹⁶ At trial, Maureen Dabbagh had testified as an expert witness on the subject of international child abduction.¹⁹⁷ On appeal, Samer Shady argued that Dabbagh was not qualified to serve as an expert witness because she possessed only two years of formal education.¹⁹⁸

The court noted that Rule 702(a) states that a witness may be qualified as an expert by virtue of "knowledge, skill, experience, training, or education," and that a witness may qualify as an expert on the basis of practical experience alone.¹⁹⁹ Dabbagh owned a consulting firm specializing in "recovery of abducted children and the assessment of the risk of future abduction," and had personally worked on more than 400 such cases.²⁰⁰ She had testified before Congress, and founded a non-profit organization involved in international child abduction

187. *Meister*, 864 N.E.2d at 1146 (citing *Burkett v. State*, 691 N.E.2d 1241, 1245 (Ind. Ct. App. 1998)).

188. *Id.* at 1147; *see also* *Lumberman's Mut. Cas. Co. v. Combs*, 873 N.E.2d 692 (Ind. Ct. App. 2007).

189. 860 N.E.2d 1212 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007).

190. *Id.* at 1222.

191. *Id.* at 1226.

192. *Id.*

193. *Id.* (citing IND. R. EVID. 702(a)).

194. *Id.* at 1228.

195. 858 N.E.2d 128 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 451 (Ind. 2007).

196. *Id.* at 137.

197. *Id.* at 138.

198. *Id.*

199. *Id.* (citing *Hobson v. State*, 795 N.E.2d 1118, 1122-23 (Ind. Ct. App. 2003)).

200. *Id.*

issues.²⁰¹ She had testified as an expert witness on this topic in at least twelve other states, served as a board member of several related organizations, and had written several papers on the topic.²⁰² The court held that Dabbagh was clearly qualified to serve as an expert witness on this topic.²⁰³

Samer Shady also claimed that Dabbagh's testimony did not comport with Rule 702(b)'s requirement that expert scientific testimony may only be offered if the court is satisfied the scientific principles behind the testimony are sufficiently reliable.²⁰⁴ The court held, however, that Dabbagh was not a scientific expert and the subject matter of her testimony was not scientific.²⁰⁵

In *Estate of Dyer v. Doyle*,²⁰⁶ the trial court allowed an expert witness to testify regarding "Faked Left Syndrome."²⁰⁷ Faked Left Syndrome is where a vehicle is traveling on the wrong side of the center line and a vehicle coming the opposite direction swerves to its left to avoid a collision.²⁰⁸ When the vehicle which was originally across the center line reacts and pulls back into its proper lane, it collides with the second vehicle and the appearance to investigators is that the second vehicle was across the center line and at fault.²⁰⁹

The expert witness for Doyle testified at trial that Faked Left Syndrome might apply in this case.²¹⁰ However, no physical evidence or testimony indicated that Dyer was ever in the wrong lane, no medical records indicated that Dyer may have been in the wrong lane, and the expert witness admitted on cross-examination that there was no evidence that Dyer had ever been in Doyle's lane.²¹¹ The court noted that Rule 702(b) allows admission of scientific testimony only if the court is satisfied that the scientific principles used are reliable.²¹² Here, the court stated that the science behind Faked Left Syndrome is dubious, and that the article written on this topic by the expert witness had not been a scientific study.²¹³ The trial court had abused its discretion in admitting this testimony because there must be some evidence other than the expert's conclusion in order to support a finding of Faked Left Syndrome.²¹⁴

In *Carlson v. Sweeney*,²¹⁵ Sweeney argued that an expert witness report was irrelevant and inadmissible as it contained a legal conclusion prohibited by Rule

201. *Id.*

202. *Id.* at 138-39.

203. *Id.* at 139.

204. *Id.* at 139 n.6 (citing IND. R. EVID. 702(b)).

205. *Id.*

206. 870 N.E.2d 573 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 221 (Ind. 2007).

207. *Id.* at 580.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 581.

212. *Id.* at 581 n.2.

213. *Id.*

214. *Id.* at 581. In other words, no matter how smart you are, you can't make stuff up.

215. 868 N.E.2d 4 (Ind. Ct. App.), *corrected on reh'g*, 872 N.E.2d 626 (Ind. Ct. App. 2007).

704(b).²¹⁶ Rule 704(b) provides that witnesses may not testify concerning legal conclusions.²¹⁷

The court found that Sweeney had waived this issue, but went on to discuss the merits.²¹⁸ While the court agreed that Rule 704(b) generally prohibits a witness from testifying as to legal conclusions, it noted that expert testimony may be required in cases involving legal malpractice which demonstrate the appropriate standard of care to be given by attorneys.²¹⁹ The court held that “to the extent [the expert witness report] discusse[d] the standard of care expected of an attorney, it [was] admissible and relevant.”²²⁰

V. HEARSAY

A. A Party's Own Statement

In *Dorman v. Osmose, Inc.*,²²¹ the Dormans argued that the trial court erred when it excluded language from Osmose contained in a previous appellate brief.²²² The excluded language contained assertions that Dorman knew the wood treatment in question had caused his injuries because a Dr. Eccles had told him so.²²³ The Dormans contended that these statements were admissions that Mark Dorman's injuries were caused by the wood treatment and were not hearsay.²²⁴

The court discussed the typical hearsay analysis. It noted that hearsay is generally not admissible under Rule 802,²²⁵ and that “[h]earsay is ‘a statement, other than one made by the declarant . . . at . . . trial . . . , offered in evidence to prove the truth of the matter asserted.’”²²⁶ The court also noted that a statement can consist of an oral or written assertion or nonverbal conduct intended as an assertion.²²⁷

The Dormans argued that the statements were not hearsay pursuant to Rule 801(d)(2), which states in relevant part that a statement is not hearsay if it is offered against a party and is the party's own statement, or it is a statement in

216. *Id.* at 22.

217. IND. R. EVID. 704(b).

218. *Carlson*, 868 N.E.2d at 22.

219. *Id.* at 23 (quoting *Indianapolis Podiatry, P.C. v. Efroymsen*, 720 N.E.2d 376, 383 (Ind. Ct. App. 1999)).

220. *Id.*; see also *Stumpf v. Hagerman Constr. Corp.*, 863 N.E.2d 871, 880 (Ind. Ct. App. 2007) (holding that an affidavit was properly excluded by the trial court because it discussed whether a duty to exercise care arose, and this is an issue of law).

221. 873 N.E.2d 1102 (Ind. Ct. App. 2007).

222. *Id.* at 1107.

223. *Id.* at 1108.

224. *Id.* at 1107-08.

225. *Id.* at 1108 (citing IND. R. EVID. 802).

226. *Id.* (quoting IND. R. EVID. 801(c)).

227. *Id.* (citing IND. R. EVID. 801(a)).

which the offeror has manifested belief.²²⁸ The Dormans also cited *Indiana State Highway Commission v. Vanderbur*, for its proposition that any statement “‘made or attributed to a party which constitutes an admission against his or her interest and tends to establish or disprove a material fact in the case is competent evidence against that party.’”²²⁹

The court noted that it agreed in general with the proposition of *Indiana State Highway Commission*, but noted that the Dormans’ earlier case was regarding a summary judgment motion premised on the statute of limitations, and that Osmose’s earlier brief in question had denied the wood treatment was the cause of the injuries and denied all material allegations in the Dormans’ complaint.²³⁰ The court held that the portions of Osmose’s earlier brief in question did not contain assertions of fact, and were therefore not admissible under Rule 801(d)(2).²³¹

B. Invited Error Doctrine

In *Boyd v. State*,²³² the trial court held that Boyd had forfeited his Sixth Amendment right to confront the witness against him because he had murdered the witness prior to her statement to police being offered at trial.²³³ Boyd also argued that the victim’s statement constituted inadmissible hearsay.²³⁴

The court noted that “[t]he Federal Rules of Evidence specifically provide that the hearsay rule does not exclude ‘[a] statement offered against a party that has engaged in or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.’”²³⁵ Although the Indiana Rules of Evidence do not contain a similar provision, the court saw no reason not to apply this rule of forfeiture as a matter of common law.²³⁶

C. Conspiracy Evidence Not Hearsay

In *Hightower v. State*,²³⁷ Hightower argued that the trial court had improperly allowed hearsay testimony during pretrial testimony.²³⁸ The trial court had determined that “the State had laid a proper foundation to support the existence of a conspiracy,” and therefore the testimony was not hearsay pursuant to Rule

228. *Id.* (citing IND. R. EVID. 801(d)(2)).

229. *Id.* (quoting *Ind. State Highway Comm’n v. Vanderbur*, 432 N.E.2d 418, 422 (Ind. Ct. App. 1982)).

230. *Id.* at 1108-09.

231. *Id.* at 1109.

232. 866 N.E.2d 855 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 208 (Ind. 2007).

233. *Id.* at 856.

234. *Id.* at 857.

235. *Id.* (quoting FED. R. EVID. 804(b)(6)).

236. *Id.* (citing IND. R. EVID. 101(a); IND. R. EVID. 802). The court further noted that this result is similar to applying the doctrine of invited error. *Id.*

237. 866 N.E.2d 356 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).

238. *Id.* at 364.

801(d)(2).²³⁹ Rule 801(d)(2) states that a statement is not hearsay if it is “offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.”²⁴⁰ Because the trial court had heard extensive testimony which laid foundation for the existence of a conspiracy prior to this evidence being offered, the court held that the trial court had not abused its discretion by allowing the testimony.²⁴¹

D. Excited Utterance

In *Mathis v. State*,²⁴² Mathis appealed his convictions for battery and interfering with the reporting of a crime.²⁴³ The trial court had allowed the responding police officer to testify as to what the victim told him because the trial determined that the statements made by the victim were excited utterances.²⁴⁴ The court noted that Rule 803(2) allows admission of an excited utterance if three conditions are met: a startling event, a statement made by the declarant while under stress from the startling event, and that the statement related to the startling event.²⁴⁵

The responding police officer stated that he had arrived within fifteen minutes of the 911 call, that the victim was upset and crying and her clothing was disheveled.²⁴⁶ The trial court had found this sufficient to allow the officer to testify as to the victim’s statement as an excited utterance.²⁴⁷ Mathis argued that the statements were not close enough in time to the event to qualify as excited utterances.²⁴⁸ The court held that Mathis’s argument was moot because the evidence revealed by those statements was merely cumulative and therefore no harm could have come from their admission.²⁴⁹

E. Present Sense Impression

In *Truax v. State*,²⁵⁰ Truax appealed his convictions for attempted murder, in part based on his contention that the trial court improperly admitted the negotiation notes of State Trooper Sorrell.²⁵¹ The trial court had not indicated

239. *Id.* at 365.

240. IND. R. EVID. 801(d)(2).

241. *Hightower*, 866 N.E.2d at 366.

242. 859 N.E.2d 1275 (Ind. Ct. App. 2007).

243. *Id.* at 1277.

244. *Id.* at 1278.

245. *Id.* at 1279 (citing IND. R. EVID. 803(2); *Fowler v. State*, 829 N.E.2d 459, 463 (Ind. 2005)).

246. *Id.* at 1278.

247. *Id.*

248. *Id.* at 1279.

249. *Id.* at 1280.

250. 856 N.E.2d 116 (Ind. Ct. App. 2006).

251. *Id.* at 124.

upon what basis it had admitted the notes.²⁵²

On appeal, Truax argued that the notes should have been barred from admission as an investigative report under Rule 803(8).²⁵³ Truax cited *Tate v. State* for its holding that Rule 803(8)(a) makes investigative police reports inadmissible hearsay unless offered by a defendant.²⁵⁴ The court held that even if the notes are inadmissible hearsay under Rule 803(8)(a), they were admissible under Rule 803(1), which allows the admission of present sense impression evidence.²⁵⁵ Rule 803 states: “The following are not excluded by the hearsay rule, even though the declarant is available as a witness. (1) Present Sense Impression. A statement describing or explaining a material event, condition or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter.”²⁵⁶

The court noted that previous case law finding this type of information admissible under the present sense impression rule dealt with verbal statements.²⁵⁷ The court stated that while it was not bound by interpretation of the Federal Rules of Evidence, Federal Rule of Evidence 803(1) has been interpreted to apply to such written reports.²⁵⁸ The court concluded that since Trooper Sorrell took the notes contemporaneously with his investigation, they qualified as present sense impressions, and the trial court had not abused its discretion by allowing admission of this evidence.²⁵⁹

F. Recorded Recollection and Prior Inconsistent Statement

In *Kubsch v. State*,²⁶⁰ Kubsch appealed his murder convictions based in part upon the trial court’s refusal to admit a videotaped statement of a witness or to allow impeachment of that witness at trial.²⁶¹ A nine-year-old witness had given a videotaped statement that she had seen one of the victims enter his house at a certain time.²⁶² At trial, she instead claimed she did not see the victim on that day and that she had no memory of the police interview.²⁶³

On appeal, Kubsch argued that the trial court should have allowed the testimony as a recorded recollection exception to hearsay or should have allowed

252. *Id.*

253. *Id.*

254. *Id.* (citing *Tate v. State*, 835 N.E.2d 499, 508-09 (Ind. Ct. App. 2005)).

255. *Id.* at 124-25.

256. IND. R. EVID. 803.

257. *Truax*, 856 N.E.2d at 125.

258. *Id.* (citing FED. R. EVID. 803(1); *United States v. Santos*, 201 F.3d 953, 963-64 (7th Cir. 2000)).

259. *Id.*

260. 866 N.E.2d 726 (Ind. 2007).

261. *Id.* at 734.

262. *Id.*

263. *Id.*

Kubsch to impeach the witness with her prior inconsistent testimony.²⁶⁴ Rule 803(5) allows for an exception to the general prohibition on hearsay evidence if a document containing knowledge that the witness was once familiar with (but cannot now recall) can be shown to have been adopted or made by the witness when it was fresh in his or her memory and reflects the knowledge correctly.²⁶⁵ Because the witness did not recall the police interview, she could not vouch for the accuracy of the document, and therefore the evidence was properly not admitted as a recorded recollection.²⁶⁶

Kubsch argued in the alternative that he should have been allowed to impeach the witness with her prior inconsistent testimony.²⁶⁷ Because she stated she could not remember the police interview, the trial court ruled that the witness had made no substantive statement that could be impeached.²⁶⁸ The court disagreed because the witness had also testified it was unlikely she would have seen the victim as she normally goes straight to daycare.²⁶⁹ Because this was directly opposed to her earlier statement that she had seen the victim, the court stated that her testimony should have been impeached.²⁷⁰ However, other testimony would have supported her testimony had she been impeached and therefore the error was held to be harmless.²⁷¹

G. Business Records

In *Richardson v. State*,²⁷² Richardson appealed her conviction for dealing in methamphetamine based in part on her argument that a third party's medical records had been admitted into evidence by the trial court over Richardson's Confrontation Clause objection and that such records are testimonial.²⁷³

The court noted that the U.S. Supreme Court in *Crawford v. Washington* had decided that testimonial evidence may not be admitted where the witness is unavailable as such evidence would violate the Sixth Amendment's Confrontation Clause.²⁷⁴ However, the court noted that business records are non-testimonial in nature and therefore the trial court had not erred by admitting the records under Rule 803(6).²⁷⁵

264. *Id.*

265. IND. R. EVID. 803(5).

266. *Kubsch*, 866 N.E.2d at 734-35.

267. *Id.* at 735.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. 856 N.E.2d 1222 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 448 (Ind. 2007).

273. *Id.* at 1229.

274. *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 42 (2004)).

275. *Id.* at 1230. Rule 803(6) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness. . . . (6) Records of Regularly Conducted Business Activity. A

In *In re Paternity of H.R.M.*,²⁷⁶ Gaddie argued on appeal that evidence, which had been admitted under the business records exception to the hearsay rule, was improperly admitted because it did not indicate that it had been filed under oath.²⁷⁷ Rule 902(9) requires that the affiant certify the records under oath.²⁷⁸

The document had stated that the affiant, “being duly sworn, state as follows.”²⁷⁹ The court held that this does not indicate before whom the affiant swore, to what she swore, that an oath was taken, or that the statements were made under penalty of perjury.²⁸⁰ The court therefore ruled the evidence inadmissible on the basis that the Rule 902(9) certification requirement had not been met.²⁸¹

CONCLUSION

The Rules continue to develop in their second decade of utilization. Understanding of how the various Rules interact and compare with their federal counterparts progresses, as well as understanding of how the Rules interact with prior common law and statutory law. New theories and scientific advancements continue to develop the Rules regarding expert testimony.

The Rules have now been in effect long enough that new cases begin to reinterpret or refine previous holdings regarding the Rules. It is clear that one cannot become an expert in the Rules based on reading the text of the Rules alone; regular review of the interpretation of the Rules will be required of all persons utilizing these Rules.

memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term “business” as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

IND. R. EVID. 803(6).

276. 864 N.E.2d 442 (Ind. Ct. App. 2007).

277. *Id.* at 448.

278. *Id.* (citing IND. R. EVID. 902(9)).

279. *Id.* at 449.

280. *Id.*

281. *Id.* at 450.

RECENT DEVELOPMENTS: INDIANA FAMILY LAW

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INTRODUCTION

This Article will consider the more important developments in the commonly recognized aspects of Indiana's vast body of family law, specifically recent cases and statutes concerning dissolution of marriage, paternity, child custody, child support, and adoption.¹

I. DISSOLUTION OF MARRIAGE

Some noteworthy dissolution of marriage cases decided by the Indiana courts during the current survey involved contested property distributions, post-nuptial agreements, expert witnesses, enforcement of property settlements, and spousal maintenance.

A. *Property Distribution*

1. *Marital Asset Issues*.—Determination of the marital estate is the first of

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1. The statutes covering these topics are located primarily in thirteen articles of title 31 of the Indiana Code. *See* IND. CODE §§ 31-9 to -21 (2004 & Supp. 2007). Specifically omitted from this Article are cases or statutory developments in child protection services, IND. CODE §§ 31-25 to -28 (Supp. 2007), and cases involving juvenile justice which arise under the eleven articles specifically referred to as "Juvenile Law" at IND. CODE §§ 31-30 to -40 (2004 & Supp. 2007). More than 200 specific definitions pertaining to title 31, sometimes applying to both family and juvenile law, sometimes one or the other, are located at IND. CODE § 31-9-2 (2004 & Supp. 2007). Further, at least fifteen other titles of the Indiana Code contain provisions concerning criminal offenses against children and family, marriage and family therapists, trust and fiduciaries, guardianships, and other family-related topics. Every legal proceeding in Indiana between parents involving child support or visitation with their children is governed by the Indiana Supreme Court's Child Support Rules and Guidelines and the Parenting Time Guidelines. Federal legislation involving taxes, bankruptcy, and distribution of retirement benefits can be a consideration in almost any case involving property settlement, child support, or spousal maintenance. Federal law can also impact adoptions of Native Americans, state laws regarding parental kidnapping, and states' obligations concerning enforcement of child support obligations, to mention just some aspects of state family law influenced by federal authority.

three broad questions encompassing the substantive law of property distribution in a dissolution of marriage action: Is it marital property? What is the value of the property? How should the property be divided?²

Of recent concern is whether *Granzow v. Granzow*³ seeks to exclude from the marital estate property interests acquired by the spouses' joint efforts where the interests vest after filing but before the actual finalization of the dissolution proceeding.⁴

2. "Property," for purposes of dissolution of marriage, "means all the assets of either or both parties, including" present rights to pensions and retirement benefits; vested rights to pensions or retirement benefits payable after the dissolution of marriage; and, disposable military retired pay. IND. CODE § 31-9-2-98(b) (2004). A dissolution court is required to divide all of the property of the parties whether it was owned by either prior to the marriage; acquired by either in his or her own right after the marriage but before final separation of the parties; or, acquired by the parties through their joint efforts. *Id.* § 31-15-7-4(a). In *Thompson v. Thompson*, 811 N.E.2d 888, 912-15 (Ind. Ct. App. 2004), the court succinctly set forth Indiana's "one-pot" theory of the marital estate. Included within the marital estate is all of the property acquired by the joint efforts of the parties. *Id.* at 914. With certain limited exceptions this "one-pot" theory "specifically prohibits the exclusion of any asset from the scope of the trial court's power to divide and award." *Id.* (quoting *Ross v. Ross*, 638 N.E.2d 1301, 1303 (Ind. Ct. App. 1994)). Only property acquired by an individual spouse after the final separation date is excluded from the marital estate. *Id.* In short, a spouse may not select which of the parties' assets are to be considered marital property, absent a valid premarital agreement. *See Huber v. Huber*, 586 N.E.2d 887, 887-89 (Ind. Ct. App. 1992). The Indiana Supreme Court has held that these statutes create a presumption that all property interests of either or both parties are subject to division and that "[t]he party who seeks to rebut the presumption, i.e., the party who seeks to have property not included (or at least not divided), bears the burden of demonstrating that the statutory presumption should not apply." *Beckley v. Beckley*, 822 N.E.2d 158, 163 (Ind. 2005); *see also* Joseph W. Ruppert & Joni L. Sedberry, *Recent Developments: Indiana Family Law*, 40 IND. L. REV. 891, 891-97 (2007); Joseph W. Ruppert & Michael G. Ruppert, *Recent Developments: Indiana Family Law*, 39 IND. L. REV. 995, 995-1001 (2006); Michael G. Ruppert & Joseph W. Ruppert, *Recent Developments: Indiana Family Law*, 38 IND. L. REV. 1085, 1085-1089 (2005).

3. 855 N.E.2d 680 (Ind. Ct. App. 2006).

4. Under Indiana Code section 31-9-2-46, the date of "final separation" in a divorce preceding for purposes of property distribution means the date the petition for dissolution of marriage is filed. IND. CODE § 31-9-2-46 (2004). It could be an earlier date if a legal separation proceeding was filed first and converted to a dissolution of marriage proceeding. *Id.* However, to limit a trial court to distributing property acquired only prior to the date of filing would limit the statutory mandate of the trial court to divide all of the property of the marriage. Indiana Code section 31-15-7-4(a) (2004) sets the property that the trial court must divide:

In an action for dissolution of marriage under [Indiana Code section] 31-15-2-2, the court shall divide the property of the parties, whether:

- (1) owned by either spouse before the marriage;
- (2) acquired by either spouse in his or her own right:
 - (A) after the marriage; and
 - (B) before final separation of the parties; or

In *Granzow* the parties were married in 1983 at which time the husband had worked for his employer for more than nine years. In August 2003, he filed a petition for dissolution of marriage. The proceeding was bifurcated.⁵ The marriage was dissolved in February 2004, and the parties' partial settlement agreement, which reserved for a final hearing all issues involving husband's pension, was approved by the trial court. The husband was vested in his company's pension at the time of the filing of his petition and at the time of the decree dissolving the parties' marriage.⁶ However, a few days after the dissolution decree and partial settlement agreement, the husband reached his thirty-year employment anniversary with his employer, which entitled him to a lump sum enhancement of more than a quarter of a million dollars over the value of his pension on the date of filing.⁷ The husband soon thereafter retired.⁸ The final hearing on property distribution was more than a year after the retirement; and, the trial court excluded the enhanced pension benefit from the marital pot in its order dividing the property.⁹ The wife appealed, arguing that the enhancement portion of the pension was a marital asset, even though the entitlement to it did not occur until after the filing of the petition for dissolution of marriage and after the court's decree dissolving the marriage (but before the final hearing on property distribution), because the enhancement was attributable to the joint efforts of the parties.¹⁰

Stating that the wife had failed to cite any Indiana cases holding that a pension enhancement or other asset vesting after the date of filing could be included in the marital estate subject to division, the court stated a surprisingly rigid view of the marital pot which seems to conflict with an Indiana Supreme

(3) acquired by their joint efforts.

Id. § 31-15-7-4(a). The Indiana Supreme Court has made it clear that the foregoing represents three classes of property and that the third class may cause inclusion of pension rights in the marital pot where they vest after the date of filing but before the decree dissolving the marriage. *See In re the Marriage of Adams*, 535 N.E.2d 124, 126-27 (Ind. 1989) (discussing IND. CODE § 31-1-11.5-11 (b) (1988), the predecessor to IND. CODE § 31-15-7-4 (2004)).

5. Under Indiana Code section 31-15-2-14, a divorce proceeding may be bifurcated, thereby allowing the parties to be divorced and have non-contested issues approved by the court, while reserving for hearing at a later date contested issues. IND. CODE § 31-15-2-14 (2004). The order dissolving the marriage in the first stage of the bifurcated proceeding is not provisional; it is final. While the divorce action is not considered completed until the second part involving the contested issues is completed, the orders issued in the first part are not voidable. Thus, for example, where a party dies after the dissolution of the parties' marriage in a bifurcated proceeding, but before a final hearing on property, the court is not deprived of jurisdiction over the property issues. *See Beard v. Beard*, 758 N.E.2d 1019, 1025 (Ind. Ct. App. 2001).

6. *Granzow*, 855 N.E.2d at 682.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 683-84.

Court decision and other appellate authority.¹¹ Indeed, *Granzow* appears to completely subordinate joint effort property to that which is vested at initiation of the divorce: “Wife essentially asks us to ignore Indiana Code Sections 31-9-2-98(b) and 31-15-7-4(b), which together provide that the dissolution court shall only divide property owned as of the date the petition is filed. This we cannot do.”¹² Thus, the *Granzow* court flatly refused to acknowledge the last of the three categories of property in Indiana Code section 31-15-7-4(a): property owned by either before the marriage; property acquired by either in his or her own right after the marriage and before final separation; or, property acquired by joint efforts.¹³

Another way to look at *Granzow* is that the court of appeals mandated the “before final separation” language in the second category of property to all three categories. Arguably, *Granzow* is not at odds with *Adams* or *Kirkman* because the enhancement did not vest until after the dissolution of the parties’ marriage, albeit before the final hearing on property distribution. *Granzow* did not afford itself that kind of leeway. Instead, the decision seems to conflict with *Adams*, *Kirkman*, and appellate court decisions following their holdings.¹⁴

Hill v. Hill,¹⁵ involved a husband’s appeal of the trial court’s property distribution on the grounds, in part, that the court should not have included any part of certain assets that were awarded to him in the marital pot. His first argument for exclusion concerned his pension, which was in pay status. He contended that, since he could not receive his monthly payments in a lump sum on demand, but rather had to wait for them, the payments did not fit the definition of pensions under the property definition statutes.¹⁶ His next exclusion argument was that certain real estate he had acquired during the marriage should not be included in the marital pot because it was acquired with funds that he brought into the marriage.¹⁷ His final argument was that certain Florida real

11. See *Kirkman v. Kirkman*, 555 N.E.2d 1293, 1294 (Ind. 1990) (following the rule in *In re Marriage of Adams*, 535 N.E.2d 124, 126-27 (Ind. 1989), in holding that a pension or retirement benefit becoming vested prior to the final dissolution decree could be divided by the trial court).

12. *Granzow*, 855 N.E.2d at 684. Indiana Code section 31-15-7-4(a)(3) requires the court to divide property acquired by joint efforts. Neither Indiana Code section 31-9-2-98(b) or section 31-15-7-4(b) (2004), individually or jointly, place any limit on the court’s ability to distribute property interests arising through spouses’ joint efforts which vest after the date the petition is filed but before finalization of the divorce.

13. IND. CODE § 31-15-7-4(a) (2004).

14. For cases following the *Adams*, 535 N.E.2d at 125-27, and *Kirkman*, 555 N.E.2d at 1294, holdings regarding three classes of divisible property, which would permit division of assets vesting after filing the petition of dissolution but before the actual decree, see *Wyzard v. Wyzard*, 771 N.E.2d 754, 757-58 (Ind. Ct. App. 2002), and *Skinner v. Skinner*, 644 N.E.2d 141, 146 (Ind. Ct. App. 1994); see also *Hodowal v. Hodowal*, 627 N.E.2d 869, 873 (Ind. Ct. App. 1994).

15. 863 N.E.2d 456, 458 (Ind. Ct. App. 2007).

16. *Id.* at 460-61.

17. *Id.* at 461.

estate should not have been included in the marital pot because he did not own the property—even though he made the down payment and signed for the loan on the property which he deeded to his son after the date of the filing for dissolution of marriage.¹⁸ The *Hill* court dispatched the husband's arguments and, in contrast to *Granzow*, favorably acknowledged the three categories of marital property which a trial court is to divide in a dissolution of marriage:

We reiterate that *all* marital property goes into the marital pot for division, even if it was owned by one spouse prior to the marriage or purchased with funds that one spouse brought into the marriage. These properties were properly included in the marital pot.

Husband also argues that the . . . real estate in Florida [is] not marital property and therefore should not have been included in the marital property because he has never owned the property. Husband did state at the final hearing that he only helped his son from a previous marriage to buy the property by giving him the down payment and signing for the loan. However, he contradicted himself when he testified that he himself bought one parcel for \$54,000.00 and the other parcel for \$47,000.00 or \$48,000.00. Furthermore, Wife testified that the Florida real estate was purchased during the marriage, and Ira Hill testified that Husband testified that he “owned two houses” in Florida. Finally, though husband apparently intended to transfer the Florida real estate to his son from a previous marriage, the deeds evidencing the transfer were not recorded until . . . eleven days *after* Wife filed for dissolution. This evidence is sufficient to support the trial court's inclusion of the Florida real estate in the marital pot.¹⁹

*England v. England*²⁰ involved a former husband's appeal of the trial court's property distribution, claiming as error the inclusion of the value of his current right to occupy property for the rest of his life because the property was owned by a third party and his right to reside on it could be terminated before the end of his life.²¹ The *England* court held that it was proper for the value of the husband's continued right to live on the property during his lifetime to be considered by the trial court in dividing the marital pot.²² In rejecting that a potential defeasance should prevent consideration of the property, the court stated:

To the extent Husband's interest in the property is defeasible, he for the most part controls the defeasance. In [earlier cases], the defeasance would occur because of an act over which the remaindermen had no

18. *Id.*

19. *Id.* (citations omitted).

20. 865 N.E.2d 644 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007).

21. *Id.* at 648-49.

22. *Id.* at 649.

control—death or change of beneficiary. Here, Husband loses his interest in the property if he abandons the property, ceases to use it as his primary residence, or opposes [the lessor's] plans to expand its landfill, all of which are choices Husband would make of his own accord. Husband also loses his interest if both dwellings on the property are destroyed or become uninhabitable. Although it is true, as Husband points out, that the dwellings could be destroyed by fire or weather tomorrow, it is also true that they may never be destroyed and Husband will live on the property virtually rent-free for the remainder of his life. Finally, Husband also loses his interest when he dies, but in that case, it is possible that he may have enjoyed the use of the property for a nominal rent up to the time of his death.²³

In *Grathwohl v. Garrity*,²⁴ the trial court expressly excluded from the marital estate real estate that the husband inherited from his mother and real estate in which the wife had a joint interest with her son by a prior marriage which also was inherited from her mother.²⁵ At trial, the husband took the position that the inherited real estate of both parties “should be included in the marital pot, but set off separately to each party.”²⁶ However, the wife argued that her inherited property should not be part of the marital estate at all because it was merely a joint tenancy with her son.²⁷ On appeal, the wife argued the same, i.e., that the court erred by excluding the husband's real estate even though it also excluded hers.²⁸ In its analysis, the court found that the trial court's exclusion of both pieces of inherited property on the basis of *Stratton v. Stratton*²⁹ was misplaced because in *Stratton* the parties stipulated to the exclusion of the marital property from the marital estate.³⁰ Noting that “[i]t has been repeatedly held that [the Indiana Code] requires inclusion in the marital estate of all property owned by the parties before separation, including inherited property,” the court of appeals stated that it was clear error to exclude the husband's property from the marital estate.³¹ Regarding the wife's property, the court considered it a bit “more complicated,” but disposed of the wife's joint tenancy argument by noting that a joint tenancy constitutes a present possessory interest.³²

Regarding [the wife's] joint tenancy argument, as a general rule an asset of a party should be included in the marital estate so long as the party has a present interest of possessory value in the asset. “When a

23. *Id.* at 650 (footnote omitted).

24. 871 N.E.2d 297 (Ind. Ct. App. 2007).

25. *Id.* at 299-300.

26. *Id.* at 299.

27. *Id.*

28. *Id.* at 301.

29. 834 N.E.2d 1146 (Ind. Ct. App. 2005).

30. *Grathwohl*, 871 N.E.2d at 301 n.4.

31. *Id.* at 301-03.

32. *Id.* at 301.

joint tenancy is created, each tenant acquires ‘an equal right . . . to share in the enjoyment of the land in their lives.’” A joint tenancy relationship confers equivalent legal rights on the tenants that are fixed and vested at the time the joint tenancy is created. Additionally, each joint tenant may sell or mortgage his or her interest in the property to a third party. Thus, [the wife] has a present right to enjoy the use of the Michigan property and the right to sell or mortgage her interest in it. This is sufficient to render her joint tenancy interest a present possessory interest for purposes of including the Michigan property in the marital estate. The trial court erred as a matter of law in excluding [the wife’s] joint tenancy interest in the Michigan property from the marital estate.³³

In *Griffin v. Griffin*,³⁴ the court held that the portion of a spouse’s military retirement pay that had been waived to receive veteran’s disability payments was not subject to equitable distribution.³⁵ In *Griffin*, the parties agreed that they would split the husband’s retirement income from the military.³⁶ The court approved their agreement.³⁷ Thereafter, the husband was awarded Veteran’s Administration (“VA”) disability benefits, which he applied for prior to the settlement agreement.³⁸ Federal law expressly forbids distribution of VA benefits and requires a reduction of the military retirement income which, in effect, is replaced by the VA benefits.³⁹ In a post-decree enforcement proceeding, the wife sought and was granted an order requiring the husband to pay her half of his retirement income from the military, including his disability payments.⁴⁰ On appeal, the husband argued that the order violated the U.S. Supreme Court’s decision in *Mansell*.⁴¹ The wife did not file an opposing brief.⁴² The Indiana Court of Appeals agreed with the husband that the trial court’s decision was clear legal error.⁴³ It did, however, state in a footnote “that many other jurisdictions have addressed the resulting situation in this case. The majority view has been described as permitting the use of equitable remedies to prevent a spouse from unilaterally and voluntarily diminishing military retirement benefits awarded to the other spouse in a dissolution decree.”⁴⁴ Basically, those decisions hold that the agreement or order provides the non-

33. *Id.* at 301-02 (citations omitted) (quoting *Cunningham v. Hastings*, 556 N.E.2d 12, 13 (Ind. Ct. App. 1990)).

34. 872 N.E.2d 653 (Ind. Ct. App. 2007).

35. *Id.* at 658 (citing *Mansell v. Mansell*, 490 U.S. 581 (1989)).

36. *Id.* at 654.

37. *Id.*

38. *Id.* at 655.

39. *Id.* at 654-55.

40. *Id.* at 658.

41. *Id.* at 655, 657.

42. *Id.* at 656.

43. *Id.* at 659.

44. *Id.* at 659 n.2.

military spouse with a vested interest in her portion of the military retirement benefits and that the vested interest cannot be unilaterally diminished by the military spouse.⁴⁵

In *Helm v. Helm*,⁴⁶ the court held that, to the extent the trial court intended to exclude the final two payments of a three million dollar lottery prize payable over twenty years, which the husband won prior to the marriage, it committed error because the husband's right to receive the final two payments after the date of filing was a vested property interest that he brought into the marriage.⁴⁷

2. *Asset Valuation Issues*.—*Galloway v. Galloway*⁴⁸ provides a good statement of the burden for going forward with the evidence of providing the value of an asset and the consequences of failing to do so. In *Galloway*, the husband and wife, both of whom were apparently represented by counsel, requested conflicting distributions of the marital property as it related to the wife's pension which was in pay status at the time of final hearing.⁴⁹ The husband, who was self-employed as a partner in an auction business, requested an even split of the pension.⁵⁰ The wife testified that she did not want the husband to receive any of the pension because she had worked for it for over thirty-one years and had helped him in his business, while he was not a good business man and went from job to job without developing any retirement savings or benefits.⁵¹ However, neither party presented any evidence of the value of the pension or the value of the husband's interest in the auction business.⁵² The trial court awarded the partnership interest to the husband and the pension in its entirety to the wife.⁵³ The remaining marital property was divided equally.⁵⁴ The husband appealed the trial court's decision, contending that it was an abuse of discretion because the trial court's distribution resulted in more than a fifty percent share to the wife, who he contended did not present evidence to rebut the statutory presumption of an equal division.⁵⁵

In what arguably amounts to reweighing the evidence, the Indiana Court of Appeals agreed with the husband's assertion that the wife failed to rebut the statutory presumption,⁵⁶ reasoning that it was the parties' obligation to present evidence of the value of the marital property—not the trial court's obligation.⁵⁷

45. *Id.* (citing *In re Marriage of Nielsen*, 729 N.E.2d 844, 849-50 (Ill. App. Ct. 2003); *Johnson v. Johnson*, 37 S.W.3d 892, 897-98 (Tenn. 2001)).

46. 873 N.E.2d 83 (Ind. Ct. App. 2007).

47. *Id.* at 88.

48. 855 N.E.2d 302 (Ind. Ct. App. 2006).

49. *Id.* at 304.

50. *Id.*

51. *Id.* at 305.

52. *Id.* at 304.

53. *Id.*

54. *Id.*

55. *Id.* at 304-05.

56. *Id.* at 306.

57. *Id.* at 305-06.

Thus, the court held that the husband waived the issue.⁵⁸

We remind the parties that the burden of producing evidence as to the value of the marital property rests squarely “on the shoulders of the parties and their attorneys.” In *Perkins*, this Court rejected the husband’s claim that the trial court’s order dividing the marital estate was vague and incomplete, relying on the principal that “any party who fails to introduce evidence as to the specific value of the marital property at a dissolution hearing is estopped from appealing the distribution on the ground of trial court abuse of discretion based on that absence of evidence.”

We are guided by the reasoning of *Perkins*, which recognized the validity of protecting the trial court from “the risk of reversal if it distributes the marital property without specific evidence of value.”⁵⁹

England v. England,⁶⁰ as discussed previously, also dealt with a challenge by the husband to the trial court’s valuation of his present possessory interest to live on the property in question for the remainder of his life, subject to defeasance for reasons primarily under his control. In *England*, the wife called a certified public accountant (“CPA”) to testify as to the value of the life-long lease of the property.⁶¹ The CPA, starting with the husband’s opinion of the monthly value of occupancy of his residence, added value for the remaining acreage and

58. *Id.* at 305. The trial court did justify its award of the entire pension to the wife and, thus, a greater share of the marital pot on the bases that the husband had failed to acquire any retirement benefits even though he was gainfully employed through all of the marriage; that the husband quit the same employer while he allowed the wife to accrue her substantial retirement benefits; and that the husband who was still employed was free to earn as much as he could, limited only by his ability and willingness to work. *Id.* Apparently, the appellate court felt that the wife’s failure to present evidence regarding her ability to work and earning capacity, and her failure to claim that the husband’s actions during the marriage constituted dissipation, amounted to a failure to present sufficient evidence for deviation from the presumption of an even distribution under Indiana Code section 31-15-7-5. The problem with the court reweighing the evidence and concluding that the evidence was not sufficient to justify deviation is that the facts in *Galloway* become nearly identical to the facts in *Schueneman v. Schueneman*, 591 N.E.2d 603, 608 (Ind. Ct. App. 1992), a case in which no evidence had been presented as to the value of the wife’s pension. In *Schueneman*, the court stated that “it is likely that the plan has some value and, by awarding it to [the wife], the trial court made an unequal distribution of the marital estate without making findings why a deviation from a 50/50 split was just and reasonable.” *Id.* at 609. In *Schueneman*, however, the appellate court remanded to the trial court for further consideration, noting that the trial court was free to order a percentage of future pension payments to the husband in light of the fact that division of the plan would be speculative without evidence of the value. *Id.*

59. *Galloway*, 855 N.E.2d at 306 (quoting *Perkins v. Harding*, 836 N.E.2d 295, 301-02 (Ind. Ct. App. 2005)).

60. 865 N.E.2d 644, 650-51 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (2007).

61. *Id.*

buildings, multiplied the value by an average life expectancy to take into consideration the husband's parent's rights to use the property, and then reduced it to a present value.⁶² Noting that Indiana has long held that occupation of real estate at low or no cost is a relevant consideration in dividing marital assets,⁶³ the *England* court reiterated the long standing principal that "a trial court has broad discretion in determining the value of property in a dissolution action, and its valuation will not be disturbed absent an abuse of that discretion."⁶⁴ The husband essentially presented only his opinion at trial which ascribed merely \$150 per month in rental value to his occupancy of the property for life.⁶⁵ Finding that the trial court had sufficient evidence upon which to value the occupancy, the court held there was no abuse of its discretion in determining the value.⁶⁶

In *Grathwohl v. Garrity*⁶⁷ the appellate court noted that its remand to the trial court due to that court's exclusion of the two inherited pieces of property without any explanation for its reasoning could result in a situation where its nearly equal distribution of property could become grossly unequal, depending upon the relative values of the properties which were highly disputed at trial. Accordingly, the court remanded with these instructions:

Thus, we cannot determine the actual total value of the marital estate and the respective percentages of the estate that [the wife] and [the husband] received; in other words, we cannot determine whether set off of the inherited properties resulted in a significantly different division of the estate than the 49/51 split reflected in the trial court's order. We remand for the trial court to include the parties' inherited property interests in the marital estate, to value those interests, and to recalculate the division of those marital assets accordingly.⁶⁸

3. *Asset Distribution Issues*.—More than two decades ago, after the Indiana Supreme Court's decision in *Luedke v. Luedke*,⁶⁹ in which the court vacated a decision of the Indiana Court of Appeals which would have created a rebuttable presumption favoring the equal division of marital property, the Indiana legislature amended the dissolution statute to include a rebuttable presumption

62. *Id.* at 646.

63. *See Vadas v. Vadas*, 762 N.E.2d 1234, 1236 (Ind. 2002); *In re Dall*, 681 N.E.2d 718, 722-23 (Ind. Ct. App. 1997); *Hacker v. Hacker*, 659 N.E.2d 1104, 1111 (Ind. Ct. App. 1995).

64. *England*, 865 N.E.2d at 651 (citing *Hiser v. Hiser*, 692 N.E.2d 925, 927 (Ind. Ct. App. 1998)). Additionally, the court cited the recent decision in *Galloway* for the proposition that "[t]he burden of producing evidence as to the value of marital assets is upon the parties to the dissolution proceeding." *Id.* (citing *Galloway*, 855 N.E.2d at 306).

65. *Id.*

66. *Id.*

67. 871 N.E.2d 297, 302 (Ind. Ct. App. 2007).

68. *Id.* What makes this case substantially different from *Galloway* is that the parties apparently did present greatly differing valuations of the wife's property in Michigan.

69. 487 N.E.2d 133, 134 (Ind. 1985).

that an equal division of marital property between the parties was just and reasonable.⁷⁰ In *Hill v. Hill*,⁷¹ discussed above, the husband's appeal also included a challenge to a division of the marital pot, arguing that the trial court committed error by equally dividing the assets. However, in reaching its decision, the trial court actually excised from its valuations of the marital property portions of the total value attributable to amounts of the husband's pre-marital assets used to acquire the marital property.⁷² In effect, the trial court erroneously excised pre-marital assets by excluding a sum equivalent to their value from the marital assets which were purchased with the pre-marital assets.⁷³ Thus, the trial court's "equal division" actually resulted in a greater distribution to the husband.⁷⁴ However, the court noted that the trial court, while not supplying adequate reasoning for its exclusion of the value of pre-marital assets, did provide sufficient reasoning for why it divided the property as it did.⁷⁵ Thus, the Indiana Court of Appeals held that the trial court did not abuse its discretion in dividing the marital property by failing to give the husband even more than the superior distribution it had given him.⁷⁶

In *Grathwohl v. Garrity*,⁷⁷ the wife complained on appeal, in addition to her

70. The most recent articulation of the presumption for equal division of marital property and its rebuttal presumption is found at Indiana Code section 31-15-7-5, which provides as follows:

The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
 - (A) before the marriage; or
 - (B) through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
- (5) The earnings or earning ability of the parties as related to:
 - (A) a final division of property; and
 - (B) a final determination of the property rights of the parties.

IND. CODE § 31-15-7-5 (2004).

71. *Hill v. Hill*, 863 N.E.2d 456, 461-62 (Ind. Ct. App. 2007).

72. *Id.*

73. *Id.* at 462.

74. *Id.* at 462-63.

75. *Id.* at 463.

76. *Id.* at 464.

77. 871 N.E.2d 297, 302 (Ind. Ct. App. 2007).

argument that the court erred regarding the exclusion of husband's inherited real estate, that the trial court erred by not finding that the husband had committed dissipation of marital assets.⁷⁸ Apparently, however, the wife never asked the trial court to find that the husband had dissipated assets:

If a party does not present an issue or argument to the trial court, appellate review of the issue or argument is waived. "This rule protects the integrity of the trial court, which should not be found to have erred as to an issue or argument that it never had an opportunity to consider." Waiver may be avoided if the newly-raised issue was inherent in the resolution of the case, the other party had unequivocal notice of the issue below and had an opportunity to litigate it, or if the trial court actually addressed the issue in the absence of argument by the parties. We do not believe that any of these exceptions to the waiver rule applies in this case.⁷⁹

However, the court noted that, even if the issue had not been waived, it did not see the complained-of behavior as constituting dissipation of marital assets.⁸⁰ At trial, the wife complained that the husband had used his income and inheritance for his own benefit to the exclusion of contributing to marital expenses by purchasing a motorcycle, Consecro stock (which became worthless), and spending money "remodeling and repairing the property he inherited from his mother."⁸¹ The court quickly pointed out that displeasure with a spouse's spending decisions does not necessarily constitute dissipation of marital assets.⁸² It stated:

Dissipation of marital assets includes the frivolous and unjustified spending of marital assets. "The test for dissipation is whether the assets were actually wasted or misused." With respect to the motorcycle, its value was included in the marital estate and [the wife] was awarded one-half of its value. The money [the husband] spent to purchase it did not completely disappear; [the wife] will be compensated for [the husband's] purchase. Additionally, [the wife] testified that she sometimes rode the motorcycle with [the husband] before their separation. Thus, [the wife] enjoyed the use of the marital asset for some time. With respect to the Consecro stock, [the husband] is far from the only person who became "stuck" with worthless stock in that company. If it had not lost all of its value, it too would have been included in the marital estate. The fact that [the husband] ultimately made a poor decision in purchasing the stock does not render such purchase frivolous. Finally, we also cannot

78. See IND. CODE § 31-15-7-5(4) (2004).

79. *Grathwohl*, 871 N.E.2d at 302 (quoting *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 834 (Ind. Ct. App. 2005)).

80. *Id.*

81. *Id.* at 303.

82. *Id.*

say that the use of money to remodel and repair the property [the husband] inherited from his mother constituted a frivolous expenditure. The use of funds to improve the condition of what we have upheld is clearly a marital asset (despite the fact of [the husband's] inheritance) is not wasteful.⁸³

In short, a way to look at the issue of dissipation is not whether the use of funds displeases a spouse, but whether it frivolously takes money out of the estate without justifiable cause.⁸⁴

B. Marital Settlement Agreements

1. *Post-Nuptial Settlement Agreements*.—There is very little appellate authority regarding post-nuptial agreements. *Augle v. Augle*,⁸⁵ a case involving a “post-nuptial” agreement, stands for the proposition that, unless the agreement provides otherwise, a trial court abuses its discretion where it modifies the agreement in a subsequent dissolution of marriage without making findings of “fraud, duress, other imperfections of consent, or manifest inequities.”⁸⁶

Several things are notable about this decision and others involving post-nuptial agreements. First, the agreement in *Augle*, like the agreement in *Pond*, was clearly executed in contemplation that the parties would eventually dissolve their marriage.⁸⁷ In *Augle*, the parties were married in 1970.⁸⁸ They separated in 2004, but agreed in their post-nuptial agreement not to file dissolution proceedings until 2006.⁸⁹ The agreement also adjusted all of their duties and obligations to each other in contemplation of a dissolution of marriage.⁹⁰ Upon filing the petition for divorce, the trial court enforced all of the provisions of the post-nuptial agreement, except a provision requiring the husband to maintain life insurance on the wife until one of their deaths.⁹¹ The trial court deleted that provision at the husband's request, and the wife appealed.⁹² She contended that the post-nuptial agreement was a settlement agreement under Indiana Code section 31-15-2-17.⁹³ *Pond* involved a similar sequence of events. In that case,

83. *Id.* (quoting *Balicki v. Balicki*, 837 N.E.2d 532, 540 (Ind. Ct. App. 2005)).

84. *Id.*

85. 868 N.E.2d 1146 (Ind. Ct. App. 2007).

86. *Id.* at 1148-49 (citing *Pond v. Pond*, 700 N.E.2d 1130, 1137 (Ind. 1998)).

87. *Id.* at 1147.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1148.

92. *Id.* at 1147-49.

93. *Id.* at 1148. See IND. CODE § 31-15-2-17 (2004), which provides as follows:

- (a) To promote the amicable settlements of disputes that have arisen or may arise between the parties to a marriage attendant upon the dissolution of their marriage, the parties may agree in writing to provisions for:
 - (1) the maintenance of either of the parties;

the parties began negotiating the terms for the settlement of their divorce long before filing.⁹⁴ Their agreement was completed and executed by both of them at the time they filed.⁹⁵ Included within their agreement was an *ad terrorem* clause which provided that if a party challenged the post-nuptial agreement and lost, he or she would pay the attorney's fees of the other.⁹⁶ The wife challenged the agreement, but the trial court upheld all of the agreement except for the provision requiring her to pay the husband's attorney's fees in the event that she unsuccessfully challenged the agreement.⁹⁷ Upon transfer, the Indiana Supreme Court found that the agreement was an agreement of settlement attendant to a divorce under Indiana Code section 31-15-2-17 and held that the trial court may reject or modify a marital settlement agreement only if it finds "fraud, duress, other imperfections of consent, or manifest inequities" pursuant to its prior decision in *Voigt v. Voigt*.⁹⁸

2. *Modification Versus Clarification of Property Settlement Orders.*—In

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- (2) the disposition of any property owned by either or both of the parties; and
 - (3) the custody and support of the children of the parties.
- (b) In an action for dissolution of marriage:
- (1) the terms of the agreement, if approved by the court, shall be incorporated and merged into the decree and the parties shall be ordered to perform the terms; or
 - (2) the court may make provisions for:
 - (A) the disposition of property;
 - (B) child support;
 - (C) maintenance; and
 - (D) custody;as provided in this title.
- (c) The disposition of property settled by an agreement described in subsection (a) and incorporated and merged into the decree is not subject to subsequent modification by the court, except as the agreement prescribes or the parties subsequently consent.

94. *Pond v. Pond*, 700 N.E.2d 1130, 1136-37 (Ind. 1998).

95. *Id.* at 1133.

96. *Id.* at 1135-36.

97. *Id.* at 1136-37.

98. *Id.* at 1137 (citing *Voigt v. Voigt*, 670 N.E.2d 1271, 1277-78 (Ind. 1996)). There appears to be no recent Indiana decision upholding a "post-nuptial" agreement executed by parties not in the contemplation of a divorce action which is filed shortly thereafter. In *Flansburg v. Flansburg*, 581 N.E.2d 430, 431-33 (Ind. Ct. App. 1991), a "reconciliation" agreement was upheld where the parties executed the agreement setting forth their right to property, spousal maintenance, and attorney's fees in the event of a future dissolution of marriage and in consideration of a dismissal of the pending dissolution action. In a later dissolution of marriage proceeding, after the prior one had been dismissed, the wife challenged the reconciliation agreement which the trial court upheld. *Id.* On appeal, the trial court was affirmed with the court stating: "We conclude that a reconciliation agreement may be enforced as long as it is entered into freely and without fraud or misrepresentation, or is not otherwise unconscionable." *Id.* at 437.

Robinson v. Robinson,⁹⁹ the Indiana Court of Appeals reversed a trial court order amending a qualified domestic relations order (“QDRO”) for the reason that it constituted an improper modification of the parties’ settlement agreement. Like property settlement agreements, which may not be modified except as provided therein or for consent vitiating circumstances, court orders concerning property distributions may not be revoked or modified except for fraud asserted within six years of the entry of the order; however, the trial court retains jurisdiction to clarify its orders.¹⁰⁰ In *Robinson*, the parties’ marriage was dissolved in 1994.¹⁰¹ The decree approved their settlement agreement and QDRO which provided that the wife would receive no more than \$1423 per month from the husband’s future pension payments, as the husband desired to limit the amount by which his future payments would be reduced.¹⁰² Unfortunately, the husband did not realize that a future pension administrator would reduce his pension by more than \$1600 per month in order to fund \$1423 per month to the wife.¹⁰³ When he retired, he discovered the error.¹⁰⁴ In other words, his settlement agreement with the wife, while capping her benefit, incorrectly assumed that the cost of funding her benefit out of his monthly benefit would be the same.¹⁰⁵ The trial court granted the husband’s request to modify the QDRO to provide that his monthly benefit would not be reduced by more than \$1423, i.e., that the wife would receive a lower monthly benefit.¹⁰⁶

On appeal, the court found the authority presented by the husband to be inapposite to the circumstance before it, as those cases related to modification of QDROs that failed to assign the risk or benefit of declines or increases in the pension benefits due to market forces.¹⁰⁷ The court found that the parties’ agreement was unambiguous and that they could have simply provided the maximum reduction from the husband’s benefit would be \$1423 per month.¹⁰⁸

99. 858 N.E.2d 203, 208 (Ind. Ct. App. 2006).

100. *Id.* at 205-06. See also Indiana Code section 31-15-7-9.1, which provides:

- (a) The orders concerning property disposition entered under this chapter (or [Indiana Code section] 31-1-11.5-9 before its repeal) may not be revoked or modified, except in case of fraud.
- (b) If fraud is alleged, the fraud must be asserted not later than six (6) years after the order is entered.

IND. CODE § 31-15-7-9.1 (2004).

101. *Robinson*, 858 N.E.2d at 204.

102. *Id.* at 205-06.

103. *Id.* at 205.

104. *Id.*

105. *Id.* at 205-06.

106. *Id.* at 205.

107. *Id.* at 205-06 (discussing *Self v. Self*, 907 So. 2d 546, 547-48 (Fla. Dist. Ct. App. 2005); *In re Marriage of Allen*, 798 N.E.2d 135, 137-38 (Ill. App. Ct. 2003); *Weller v. Weller*, 684 N.E.2d 1284, 1286-88 (Ohio Ct. App. 1996)).

108. *Id.* at 205 n.10, 208 (discussing *Niccum v. Niccum*, 734 N.E.2d 637, 637-39 (Ind. Ct. App. 2000)). While a trial court retains jurisdiction to interpret and enforce its own decree, *Thomas*

Thus, the trial court abused its discretion by ordering modification of the QDRO which, in effect, resulted in an improper modification of the parties' settlement agreement.¹⁰⁹

C. Enforcement of Dissolution Orders

1. *Interest on Orders.*—In *Zoller*¹¹⁰ the trial court enforced its decree for the payment of a sum of money to the wife and added substantial interest from the date of the entry of the decree.¹¹¹ On appeal, the husband complained that when the trial court entered its decree giving the husband the parties' marital residence in 2002 and ordering him to pay the wife more than \$62,000 to equalize the distribution, the decree said nothing about interest.¹¹² Therefore, he argued he should not be ordered to pay interest due to his failure to pay the court order in the decree.¹¹³ The order in the decree requiring the husband to pay the wife was not called a judgment.¹¹⁴

On appeal, the court noted that “[t]he issue of whether an amount ordered to be paid as part of the trial court’s property division in a dissolution action bears interest has been the subject of some dissension.”¹¹⁵ In a succinctly reasoned analysis, the court noted that Trial Rule 54 of the Indiana Rules of Trial Procedure defining “a ‘judgment’ includes a decree [of dissolution of marriage] and any order from which an appeal lies”; that a decree “becomes final and appealable when entered by the trial court”; that an order to pay a sum of money in a dissolution property order is a money judgment; and that “money judgments, including sums ordered to be paid in the dissolution decree, accrue interest” even if not expressly provided for in the dissolution decree.¹¹⁶

2. *Enforcement of Distribution Order by Contempt.*—In *Mitchell v. Mitchell*,¹¹⁷ the Indiana Court of Appeals essentially extended the proposition in prior authority that the court’s contempt power may be used to compel compliance with a decree’s hold harmless clause. *Mitchell* involved a divorce settlement in which the husband agreed to hold the wife harmless from obligations that he was assuming or had assumed.¹¹⁸ He failed to do so, and the

v. Thomas, 557 N.E.2d 216, 219 (Ind. 1991), the standard for the trial court and upon review is that, “[u]nless the terms of a contract are ambiguous, they will be given their plain and ordinary meaning.” *Robinson*, 858 N.E.2d at 205-06 n.2 (quoting *Niccum*, 734 N.E.2d at 639).

109. *Robinson*, 858 N.E.2d at 208.

110. 858 N.E.2d 124 (Ind. Ct. App. 2006).

111. *Id.* at 126.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (citing IND. CODE § 31-15-2-16(b) (2004); *Williamson v. Rutana*, 736 N.E.2d 1247 (Ind. Ct. App. 2000); *Van Ripper v. Keim*, 437 N.E.2d 130 (Ind. Ct. App. 1982)).

117. 871 N.E.2d 390, 396 (Ind. Ct. App. 2007).

118. *Id.* at 391.

wife brought numerous contempt actions against him resulting in findings that he was in contempt and orders to purge the contempt or face incarceration.¹¹⁹ At one point during these numerous contempt proceedings the husband actually was incarcerated.¹²⁰

Eventually, the trial court began to entertain considerable doubts about its ability to continue tossing the husband in jail for failure to hold the wife harmless.¹²¹ The trial court appointed the husband an attorney due to the wife's continued request that he be incarcerated.¹²² Based upon the decision in *Merritt v. Merritt*,¹²³ the trial court held that contempt was not available to enforce a hold harmless clause.¹²⁴

The court simply skirts the prescription of Indiana Constitution article I, section 22 prohibiting imprisonment for debt¹²⁵ by saying that a hold harmless clause is not an order to pay a fixed sum in installments or a lump sum.¹²⁶ Additionally, where a hold harmless clause requires the offending party to make installments to a third party, how can imprisonment for contempt for failure to fulfill the hold harmless clause be any different than failure to pay any other debt—by lump sum or installment?¹²⁷ This is certainly a triumph of form over substance inasmuch as the amount owed to a creditor can be ascertained and reduced to a judgment in favor of one spouse and against the other. Additionally, where a hold harmless clause requires the offending party to make installment payments to a third party, how can imprisonment for contempt for failure to fulfill the hold harmless clause be any different than imprisonment for failure to pay any other debt?¹²⁸

119. *Id.*

120. *Id.* at 391-93.

121. *Id.* at 393.

122. *Id.*

123. 693 N.E.2d 1320, 1324 (Ind. Ct. App. 1998).

124. *Mitchell*, 871 N.E.2d at 394-96. Speaking of *Merritt*, the court decided its holding was dicta and decided not to follow it, stating that:

[In *Merritt*], [w]e affirmed and held that the hold harmless provision constituted an award of property, not a support obligation, and that therefore it was dischargeable in bankruptcy. As the debt was discharged in bankruptcy, the obligation could not be enforced. But, we went on to say in *dicta*, “[B]ecause [a] hold harmless provision constitute[s] a property settlement award, it may not be enforced through contempt proceedings. Property settlement agreements incorporated into a final decree of dissolution may not be enforced by contempt citation.” We find this *dicta* to be too broad.

Id. at 394-95 (citing and quoting *Merritt*, 693 N.E.2d at 1324) (footnote omitted).

125. IND. CONST. art. I, § 22.

126. *Mitchell*, 871 N.E.2d at 394-96.

127. *Id.*

128. See *Cowart v. White*, 711 N.E.2d 523, 531 (Ind. 1999) (finding that contempt is unavailable to enforce a hold harmless clause which requires installment payments to a third party). It should be noted, however, that *Cowart* upheld contempt findings by the trial court due to the

D. Spousal Maintenance

1. *Proof of Disability*.—In *Matzat v. Matzat*,¹²⁹ the Indiana Court of Appeals reversed that portion of the trial court's dissolution decree awarding post-decree incapacity maintenance to the wife, holding she failed to provide sufficient medical evidence of her disability. In *Matzat*, the husband appealed the trial court's award of incapacity maintenance to the wife and its exclusion of evidence that the Social Security Administration denied her disability claim at the hearing on his motion to correct errors.¹³⁰

In *Matzat*, the wife's only evidence of her incapacity was "that she could no longer work as a certified nurse because she was unable to lift patients," that she could not sit sufficiently long enough to do other work, and that she had applied for social security disability benefits.¹³¹ The trial court awarded her incapacity maintenance of \$200 per week and required the husband to continue her health insurance coverage until she began receiving the benefits.¹³² The husband filed a motion to correct errors contending that the award of maintenance was an abuse of discretion.¹³³ At the hearing on the motion to correct errors, the husband attempted to introduce evidence that the Social Security Administration had denied the wife's claim for disability.¹³⁴ Concerning the exclusion of the evidence at the hearing on the motion to correct errors, the court found that the evidence was improperly excluded because it fit the criteria for newly discovered evidence, it had not been issued until after the final hearing, and it was relevant to show the wife's claim for disability benefits was based, in part, on reasons other than those cited at trial.¹³⁵ Noting that it has long-been held that medical testimony is not required to support an award of incapacity maintenance where the spouse testified that she was receiving Social Security Disability benefits due to a medical condition,¹³⁶ the court stated:

While our research has not yielded a single, reported case in which this court has reversed the trial court's grant or denial of an incapacity maintenance award on the basis of evidentiary sufficiency, it has also not produced a case where the evidence supporting an award was as meager as the one here.¹³⁷

husband's failure to maintain certain real estate, sell it, and divide the proceeds with the former spouse. *Id.*

129. 854 N.E.2d 918, 922 (Ind. Ct. App. 2006).

130. *Id.* at 919.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 919-20.

136. *Id.* at 920-21 (citing *Paxton v. Paxton*, 420 N.E.2d 1346, 1348 (Ind. Ct. App. 1981)).

137. *Id.*

Under these circumstances, the court's decision is important for the examples it provides for what the allegedly incapacitated spouse must prove regarding her impairments and their impact on the ability to support:

[The wife] had the burden of proof on this issue; from her testimony we know that she claimed back problems, including back pain, that she had sought medical treatment, that she takes medication for the pain, and that she claimed to have left her job as a certified nurse because she could not lift patients. She also claimed that she had trouble standing, sitting, or walking for extended periods of time.

[The wife] presented no medical evidence to support her claim of incapacity. We have no reports from treating or examining physicians. We have no expert opinion testimony. We have no x-rays or magnetic resonance imaging tests. We do not know the nature of her back problems or the cause. We do not know either the diagnosis or the prognosis. We also do not know the recommended treatment and whether she has followed that treatment. We do not know the limits, if any, that doctors may have placed on her. We do not know whether the problems are quiescent. We do not know whether they are temporary or permanent.¹³⁸

Accordingly, the trial court's award of incapacity maintenance was reversed because wife's evidence of her impairments was insufficient to show the extent to which they limited her ability to support herself.¹³⁹

II. CHILD CUSTODY

A. *Jurisdiction*

On August 15, 2007, Indiana's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")¹⁴⁰ became effective.¹⁴¹ UCCJEA is a uniform state law approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") to replace the Uniform Child Custody Jurisdiction Act ("UCCJA").¹⁴²

The UCCJEA governs State courts' jurisdiction to make and modify "child custody determinations," a term that expressly includes custody and visitation orders.

138. *Id.* at 921.

139. *Id.*

140. IND. CODE § 31-21-1-1 (Supp. 2007).

141. *Novatny v. Novatny*, 872 N.E.2d 673, 678 n.5 (Ind. Ct. App. 2007).

142. Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, JUV. JUST. BULL., Dec. 2001, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/189181.pdf> (footnotes omitted).

The Act requires State courts to enforce valid child custody and visitation determinations made by sister State courts. It also establishes innovative interstate enforcement procedures.

The UCCJEA is intended as an improvement over the UCCJA. It clarifies UCCJA provisions that have received conflicting interpretations in courts across the country, codifies practices that have effectively reduced interstate conflict, conforms jurisdictional standards to those of the Federal Parental Kidnapping Prevention Act (the PKPA) to ensure interstate enforceability of orders, and adds protections for victims of domestic violence who move out of State for safe haven.

The UCCJEA, however, is not a substantive custody statute. It does not dictate standards for making or modifying child-custody and visitation decisions; instead, it determines which States' courts have and should exercise jurisdiction to do so. A court must have jurisdiction (i.e., the power and authority to hear and decide a matter) before it can proceed to consider the merits of a case. The UCCJEA does not apply to child support cases.¹⁴³

143. *Id.* IND. CODE § 31-21-1-1 (Supp. 2007) provides: "This article does not apply to: (1) an adoption proceeding; or (2) a proceeding pertaining to the authorization of emergency medical care for a child." IND. CODE § 31-21-2-4 (Supp. 2007) provides:

- (a) "Child custody determination" means a judgment, decree, or other court order providing for:
 - (1) legal custody;
 - (2) physical custody; or
 - (3) visitation;with respect to a child.
- (b) The term does not include an order relating to child support or other monetary obligation of a person.

IND. CODE § 31-21-2-5 (Supp. 2007) provides:

- (a) "Child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for:
 - (1) dissolution of marriage or legal separation;
 - (2) child abuse or neglect;
 - (3) guardianship;
 - (4) paternity;
 - (5) termination of parental rights; and
 - (6) protection from domestic violence;in which the issue of child custody or visitation may appear.
- (b) the term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement of child custody under [Indiana Code section] 31-21-6.

Indiana Code section 31-21-7-3 provides that any relevant action governed by the statute that was commenced before July 1, 2007, is governed by the law in effect at the time.¹⁴⁴

Several cases involving the UCCJA as it existed prior to July 1, 2007, were decided during the survey period. *Cox v. Cantrell*¹⁴⁵ involved the transferring of the jurisdiction of a custody proceeding from Indiana to Michigan where father's three children were receiving therapy while in residential placement. The mother, who had custody of the parties' three children, had moved from Indiana to Michigan.¹⁴⁶ On June 8, 2006, the Michigan Department of Human Services filed a petition alleging the children had been abused and neglected, and they were removed from the mother's care and put in residential placement.¹⁴⁷ On June 15, 2006, the father and mother filed a joint stipulation for change of custody and support with the Elkhart Superior Court.¹⁴⁸ They stipulated that it was in the best interests of the children for custody to be changed from the mother to the father.¹⁴⁹ On the same day, without a hearing, the Elkhart Superior Court approved the parties' stipulation, concluding that it had continuing and prior jurisdiction over the children.¹⁵⁰ The trial court further ordered the children to be returned to the State of Indiana to the father's custody as soon as possible.¹⁵¹ Thereafter, the judge of the Michigan court and the judge of the Indiana court held a telephone conference in which it was decided that the best interests of the children required that they remain in residential care (where they were receiving medical and psychological care) and that the jurisdiction was to be in the State of Michigan.¹⁵² The Indiana trial court ordered the jurisdiction changed to Michigan.¹⁵³

The father appealed contending, in sum, that the trial court lacked statutory authority to issue the order transferring jurisdiction of the proceedings to the Michigan court, that the father's due process rights had been violated by the two courts holding a telephone conference, and that the Indiana order violated Michigan law.¹⁵⁴ In affirming the trial court, the Indiana Court of Appeals

144. IND. CODE § 31-21-7-3 (Supp. 2007) provides: "A motion or other request for relief made: (1) in a child custody proceeding; or (2) to enforce a child custody determination; that was commenced before July 1, 2007, is governed by the law in effect at the time the motion or other request was made." *But see* *Novatny v. Novatny*, 872 N.E.2d 673, 678 n.5 (Ind. Ct. App. 2007) (stating effective date of August 15, 2007).

145. 866 N.E.2d 798, 802 (Ind. Ct. App. 2007).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 803.

153. *Id.*

154. *Id.* at 804-05, 808-10.

concluded that federal law required the trial court in Indiana to give full faith and credit to the Michigan court's custody determination because the Michigan court's exercise of jurisdiction to remove the children from the mother's custody was controlled by the emergency provision of the PKPA.¹⁵⁵ The court reasoned that the facts of the case indicated that the proceeding in Michigan was the equivalent of an Indiana Child in Need of Services Proceeding because the children had to be removed from their mother for their own physical and emotional welfare.¹⁵⁶ The court stated:

When such a tragic emergency occurs, the state where the children are located should and does have authority under federal law to immediately take action to protect the children located within its borders. Public policy supports such law when the state where the child is physically located has the best knowledge of the circumstances as well as the resources to take immediate action to ensure the child's protection. Therefore, Michigan was exercising its jurisdiction as provided under federal law, and Indiana was required to give full faith and credit to Michigan's temporary custody determination to put the children in residential placement for treatment.¹⁵⁷

The father also contended that the trial court violated his due process rights in holding a telephone conference with the Michigan court judge to determine the appropriate state jurisdiction.¹⁵⁸ The court disagreed quoting Indiana Code section 31-17-3-6(c) which provides that:

"If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 19 through 22 of this chapter."¹⁵⁹

The Indiana Court of Appeals stated that not only is a trial court authorized to communicate with another state court to determine the appropriate jurisdiction, but it is required to do so upon learning that a proceeding concerning the custody of a child under its jurisdiction is pending in another state.¹⁶⁰ The father had argued that Indiana Code section 31-17-3-4 required that, before the court could make a decree, reasonable notice and opportunity had to be given to all the parties including the parents.¹⁶¹ The court held that the trial court's order

155. *Id.* at 807.

156. *Id.* at 808.

157. *Id.*

158. *Id.*

159. *Id.* (quoting IND. CODE § 31-17-3-6(c) (1998)).

160. *Id.* at 809.

161. *Id.*

transferring jurisdiction to the Michigan court was neither a decree nor a custody determination but was merely an order concluding that Michigan was the more appropriate forum to handle the custody proceeding.¹⁶²

In *Novatny v. Novatny*¹⁶³ the mother and father were divorced in Indiana. The mother was given custody of the children and subsequently petitioned the court to relocate the children to Virginia.¹⁶⁴ After a hearing, this petition was granted, and the mother moved the children to Virginia.¹⁶⁵ Prior to the hearing on relocation, the father had moved from the State of Indiana to the State of Illinois.¹⁶⁶ Approximately two-and-one-half years after the trial court had granted the mother's petition to relocate the children to Virginia, the father filed a petition to modify custody of the children.¹⁶⁷

The mother filed an objection under the UCCJA contending that Indiana no longer had jurisdiction over this case because neither of the parties resided in Indiana any longer and Virginia was the home state of the children.¹⁶⁸ The father countered by pointing out that no action had been initiated in Virginia and, therefore, no Virginia court had assumed jurisdiction, so it was appropriate for Indiana to retain jurisdiction.¹⁶⁹ The trial court agreed.¹⁷⁰ After a hearing the trial court granted the father's petition to modify.¹⁷¹ The mother appealed.¹⁷²

The court of appeals vacated the trial court's order and held that the trial court lacked jurisdiction under the UCCJA to hear the father's petition.¹⁷³ The court noted that the state that first enters a custody decree in a matter retains exclusive jurisdiction under the UCCJA, but that jurisdiction continues only until all the parties and the children have left the state.¹⁷⁴ Once all the parties and the children have left the state and the children acquire a "home state"¹⁷⁵ other than Indiana, then jurisdiction may not be assumed in Indiana unless the home

162. *Id.*

163. 872 N.E.2d 673, 675-76 (Ind. Ct. App. 2007).

164. *Id.* at 676.

165. *Id.* at 676-77.

166. *Id.* at 676.

167. *Id.* At the time of the filing of the father's petition he continued to live in Illinois, the mother had moved the children to Virginia in February 2004, and that was where they were living at the time the petition was filed. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 682.

174. *Id.* at 679 (citing *In re Custody of A.N.W.*, 798 N.E.2d 556, 561 (Ind. Ct. App. 2003)).

175. Indiana Code section 31-17-3-2(5) (2004) (repealed 2007) defines "home state" as the state in which the child, immediately preceding the time involved, lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive months . . . Periods of temporary absence of any of the named persons are counted as part of the six (6) months or other period.

state has declined its jurisdiction.¹⁷⁶ The court further stated that, even though Virginia had not assumed jurisdiction of the case, no evidence in the record indicated that Virginia had declined jurisdiction either.¹⁷⁷ The court noted that under the UCCJA, Virginia qualified as the children's home state.¹⁷⁸

After the father had been granted custody of the children by the trial court and before the appeal was decided, he moved back to Indiana with the children.¹⁷⁹ He argued that through the passage of time, by operation of law, Indiana would now be the children's home state.¹⁸⁰ The court dismissed that argument by pointing out that the trial court did not have jurisdiction over the father's petition when he had filed it.¹⁸¹ "When a court lacks subject matter jurisdiction, its actions are *void ab initio* and may be challenged at any time."¹⁸²

B. Factors Affecting Modification of Custody

1. *Consistent Denial of Visitation and Failure to Foster Parent/Child Relationship.*—*In re Marriage of Kenda*¹⁸³ involved a case where the mother and father were both citizens of a foreign country.¹⁸⁴ The parties were divorced in the District of Columbia Superior Court.¹⁸⁵ The mother eventually relocated to Indiana where she filed a petition to modify non-custodial parenting time.¹⁸⁶ The father countered by filing a petition for modification of custody, parenting time, child support, and request for custody evaluation.¹⁸⁷ The custody evaluation was performed with the conclusion that the mother retain physical custody of the parties' minor child.¹⁸⁸ Prior to the hearing on the matter, the father filed a motion for contempt citation alleging that the mother had refused to allow any parenting time, unless it was supervised, since prior to the filing of her petition to modify, which was not a requirement under the divorce decree.¹⁸⁹ Indeed, the record was replete with evidence of the mother's interference with the father's

176. *Novatny*, 872 N.E.2d at 680 (citing *Hughes v. Hughes*, 665 N.E.2d 929, 932 (Ind. Ct. App. 1996)).

177. *Id.* "Apparently, Virginia had never been requested to assume jurisdiction prior to the filing of [f]ather's petition." *Id.*

178. *Id.*

179. *Id.* at 681.

180. *Id.*

181. *Id.*

182. *Id.* (quoting *Allen v. Proksch*, 832 N.E.2d 1080, 1095 (Ind. Ct. App. 2005)).

183. 873 N.E.2d 729, 731 (Ind. Ct. App.), *trans. denied*, *Kenda v. Pleskovic*, 878 N.E.2d 222 (Ind. 2007).

184. *Id.*

185. *Id.*

186. *Id.* at 731-32.

187. *Id.* at 732.

188. *Id.*

189. *Id.*

parenting time.¹⁹⁰ After trial, the court denied the mother's request for supervised parenting time and granted the father's petition for modification of custody.¹⁹¹ The mother appealed.¹⁹²

On appeal, the mother argued that the trial court's modification decision was based on her perceived violations of the trial court's prior orders regarding visitation rather than the statutory factors.¹⁹³ In Indiana, a trial court cannot modify custody unless it first determines that a substantial change in circumstances has occurred and that a modification is in the best interest of the child.¹⁹⁴ The burden of demonstrating that the existing custody order is unreasonable is upon the party seeking the modification, and the court needs to keep in mind that stability and permanence are considered best for the child.¹⁹⁵

In this case the court of appeals found that the relationship between the father and the child had been substantially changed due to the mother's efforts to prevent such a relationship by interfering with the father's visitation rights as provided by court order.¹⁹⁶ The court further noted that it was in the child's best interest to "have a well-founded relationship with each parent" and that prior decisions have held that when a custodial parent denies visitation rights to the other parent without evidence that the non-custodial parent is a threat to the

190. *Id.* at 738.

191. *Id.* at 735.

192. *Id.*

193. *Id.* at 737. Pursuant to Indiana Code section 31-17-2-21, the court may not modify a child custody order unless modification is in the child's best interest and there is a substantial change in one of the factors found at Indiana Code section 31-17-2-8 which are as follows:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parent or parents;
 - (B) the child's sibling; and
 - (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's:
 - (A) home;
 - (B) school; and
 - (C) community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

IND. CODE § 31-17-2-8 (2004).

194. *In re Marriage of Kenda*, 873 N.E.2d at 737.

195. *Id.*

196. *Id.* at 739.

child, such may be a proper grounds to modify custody.¹⁹⁷ Based on the significant evidence of the mother's denial and interference with the father's rights, the trial court did not abuse its discretion in modifying custody.¹⁹⁸

2. *Gender and Wishes of the Child*.—In custody determination matters in Indiana, the appellate courts “accord latitude and great deference to a trial court’s custody determination.”¹⁹⁹ This is because the trial court often considers sensitive and subtle factors, has the ability to speak with and observe the parties and the principals, and thus is in a far better place to perform the necessary personal and interpersonal evaluations to weigh the competing considerations.²⁰⁰ This latitude and deference was accorded to the trial court in the case of *Sabo v. Sabo*.²⁰¹

In *Sabo*, when the mother and father divorced they had reached an agreement of settlement which provided that the child would live with one parent during the school year and with the other parent during the summer vacation.²⁰² The mother was in the military and had relocated several times while the father remained in Indiana.²⁰³ Up to and including her eleventh birthday the child had lived with the father during the school year and with the mother during the summer vacations.²⁰⁴ During the school year the child developed a close relationship not only with the father, but also with the father’s family and some newly acquired friends.²⁰⁵ During the summer vacation the child was exposed to different and sometimes exotic locales while with the mother in which she benefited culturally, educationally, and emotionally.²⁰⁶ As she approached puberty and her twelfth birthday, the child made a request that she be allowed to live with the mother during the school year and with the father during the summer vacations.²⁰⁷ Primarily, the child felt more comfortable discussing the issues of puberty and adolescence with her mother.²⁰⁸ The mother requested a change in the custody arrangement to accommodate the daughter’s wishes.²⁰⁹ A custody evaluation was performed which determined that both parents were responsible, conscientious, and loving parents.²¹⁰ The custody evaluator stated that the child had expressed a desire to be with the mother during the school year for the previously stated

197. *Id.* (citing *Johnson v. Natton*, 615 N.E.2d 141, 146 (Ind. Ct. App. 1986); *Bays v. Bays*, 489 N.E.2d 555, 561 (Ind. Ct. App. 1986)).

198. *Id.* at 740.

199. *Sabo v. Sabo*, 858 N.E.2d 1064, 1071 (Ind. Ct. App. 2006).

200. *Id.*

201. *Id.*

202. *Id.* at 1066.

203. *Id.*

204. *Id.*

205. *Id.* at 1067.

206. *Id.* at 1069.

207. *Id.* at 1067 n.1.

208. *Id.* at 1069.

209. *Id.* at 1067.

210. *Id.*

reasons.²¹¹ The court conducted an in camera interview in which the child stated the same reasons.²¹² Testimony of both the parents was taken.²¹³ At the conclusion of the hearing, the trial court awarded school-year custody to the mother and summer vacation custody to the father.²¹⁴ The father appealed.²¹⁵

On appeal, the father argued essentially that the trial court committed error by considering the wishes of the child because she was only eleven years of age and not fourteen as specified in Indiana Code section 31-14-13-2(3).²¹⁶ In affirming the trial court, the court of appeals noted that the court's decision was driven solely by a consideration of the best interests of the child and that it was neither a custody modification nor an initial custody determination.²¹⁷ Regardless, however, the court noted that when custody rights of the parents are determined, the best interests of the child are the primary consideration.²¹⁸

Here, the fact that the child wanted to spend a specified period of time with the same gender parent because of puberty issues was a factor that the trial court could consider.²¹⁹ With respect to the issue of whether the child had to be at least fourteen years of age before the court could consider her wishes, the court of appeals noted that Indiana Code section 31-14-13-2(3) did not prevent the court from considering the wishes of a child under fourteen years of age—merely that a child's wishes are to be given more weight in the court's balancing of factors if the child was at least fourteen years of age.²²⁰ Thus, considering the child's desire to live with the mother was appropriate as long as the trial court's decision had not considered only the child's wishes on the subject.²²¹ Here, the trial court considered all the factors and circumstances bearing upon the child's best interest and did not commit an abuse of discretion.²²²

3. *Failure of Children to Progress Academically.*—In the case of *Webb v. Webb*,²²³ the mother and father had been awarded joint legal custody with primary physical custody of the children being given to the mother. The father

211. *Id.* at 1066-67.

212. *Id.* at 1068 n.1.

213. *Id.* at 1067.

214. *Id.* at 1067-68.

215. *Id.* at 1068.

216. *Id.* at 1070 (citing IND. CODE § 31-14-13-2(3) (2004)).

217. *Id.* at 1068-69. "The difference is generally important. In an initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered." *Id.* at 1068 (citing *Hughes v. Roqusta*, 830 N.E.2d 898, 900 (Ind. Ct. App. 2005)).

218. *Id.* Indiana Code section 31-14-13-2(3) is the initial custody statute. IND. CODE § 31-14-13-2(3) (2004). The court noted that the terms of the agreement of settlement were not being changed. *Sabo*, 858 N.E.2d at 1068.

219. *Id.* at 1068-69.

220. *Sabo*, 858 N.E.2d at 1068.

221. *Id.* at 1070.

222. *Id.* at 1070-71.

223. 868 N.E.2d 589, 591 (Ind. Ct. App. 2007).

filed a petition to modify that custody provision, and the trial court awarded sole legal and physical custody to the father.²²⁴ The mother appealed, contending that the evidence was insufficient to prove that the custody modification would be in the children's best interests and that the evidence did not establish that a substantial change in circumstances had occurred.²²⁵ At trial, evidence was introduced that demonstrated significant failure of the children to progress academically while in the mother's care.²²⁶ The evidence further demonstrated that one of the problems preventing the children's educational progress was the failure of the mother to ensure that their homework was completed or turned in while the children were in her care.²²⁷ Evidence also showed that the father was very proactive in attempting to address the children's problems through the school.²²⁸ Evidence further showed resistance from the mother regarding the father's efforts.²²⁹

In affirming the trial court, the court of appeals again reiterated the factors and burden established by Indiana Code section 31-17-2-8.²³⁰ In analyzing the evidence in the record in light of the statute, the court agreed with the trial court that the failure of the children to progress academically constituted a substantial change in circumstances that warranted modification of the custody provision and that it would be in the best interests of the children to grant sole legal and physical custody to the father.²³¹

C. Modification of Joint Legal Custody to Sole Legal Custody

In Indiana, an appellate court will affirm an award of joint legal custody where the parents demonstrate a willingness and ability to communicate and cooperate in advancing the welfare of the children.²³² In the case of *Tompa v. Tompa*,²³³ the court of appeals affirmed a trial court's decision to modify the joint legal custody of the parties' two minor children to sole legal custody in the father. The record demonstrated that the parties had quite a contentious post-dissolution relationship.²³⁴ The mother and father's relationship was particularly marked by the mother's frequent accusations that the father was a sexual abuser of children despite the conclusion of a panel of psychologists that they were unable to determine to a reasonable degree of certainty whether the children had

224. *Id.*

225. *Id.* at 592.

226. *Id.* at 593.

227. *Id.*

228. *Id.* at 593-94.

229. *Id.* at 593.

230. *Id.* at 592-93.

231. *Id.* at 594.

232. *Walker v. Walker*, 539 N.E.2d 509, 513 (Ind. Ct. App. 1989).

233. 867 N.E.2d 158, 164 (Ind. Ct. App. 2007).

234. *Id.* at 161-62.

been abused by anyone.²³⁵ The trial court had also found that the mother's allegations of sexual misconduct by the father were unsubstantiated.²³⁶

The mother appealed the trial court's order contending it had abused its discretion and that the evidence reflected in the trial court's findings and conclusions did not support a change in the custody arrangement.²³⁷ The mother pointed out that no fundamental difference "in child rearing philosophies, religious beliefs, or lifestyles" existed between the parents.²³⁸ The court of appeals, however, noted that the record revealed that child rearing between the parties had become a battleground.²³⁹ The court stated: "The record is saturated with evidence documenting the tensions, lack of communication, and lack of cooperation associated with the [parties'] joint legal custody arrangement."²⁴⁰ As an example, the record was "replete with references of the parties' inability to communicate concerning the children's extracurricular activities, schooling, vacations, and missed visitation opportunities."²⁴¹ Therefore, the trial court properly used its discretion in modifying the joint legal custody arrangement to sole legal custody in favor of the father.²⁴²

As a cautionary note regarding joint legal custody, the court of appeals further stated that "[i]n this light, we whole heartedly agree with the following words stated in the dissenting opinion in *Lamb v. Wenning*: 'The pitfall of awarding and maintaining a joint custody arrangement primarily to placate the [parents] should be avoided as not in the best interests of the child.'"²⁴³

D. Custody and Third Parties

Before a trial court can place a child in the custody of a person other than the natural parents, it must be satisfied by clear and convincing evidence that the best interests of the child require a placement with the third person.²⁴⁴ In the case of *Truelove v. Truelove*²⁴⁵ the trial court awarded custody of the mother's children to their paternal grandparents. The mother appealed contending, among other things, that "the trial court was specifically required to find that the Grandparents were de facto custodians of the Children, Mother was unfit, or Mother had long acquiesced to the Grandparents' custody of the Children."²⁴⁶ Because the

235. *Id.* at 164.

236. *Id.*

237. *Id.* at 163.

238. *Id.*

239. *Id.*

240. *Id.* at 163-64.

241. *Id.* at 164.

242. *Id.*

243. *Id.* (alteration in original) (quoting *Lamb v. Wenning*, 583 N.E.2d 745, 753 (Ind. Ct. App. 1991), *rev'd on different grounds*, 600 N.E.2d 96 (Ind. 1992)).

244. *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002).

245. 855 N.E.2d 311, 313 (Ind. Ct. App. 2006).

246. *Id.* at 314.

evidence did not support any of these findings, she contended that the trial court's order lacked sufficient evidence to support a finding that placement with the grandparents was in the children's best interests.²⁴⁷

In addressing these arguments of the mother, the court of appeals noted the following:

The presumption in favor of the natural parent will not be overcome merely because a third party could provide better things for the child. In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would be important, but the trial court is not limited to these criteria. The issue is not merely the "fault" of the natural parent, but rather it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review.²⁴⁸

Taking the above into consideration, the court of appeals noted that the trial court was not required to make specific findings of the mother's unfitness or her acquiescence to the children's living arrangements.²⁴⁹ Instead, the trial court carefully reviewed the substantial evidence that existed showing that the parents' circumstances were such that "[they] can barely take care of themselves, let alone two children in addition to themselves."²⁵⁰ Based upon the evidence from the record, the court of appeals agreed that clear and convincing evidence established that the children's best interests were substantially served by placement with the grandparents.²⁵¹

The issue of whether the trial court must specifically find unfitness, abandonment, or acquiescence on the part of the child's parents was raised in the subsequent case of *Blaisius v. Wilhoff*.²⁵² In this case, the Wilhoffs filed a petition to adopt a child.²⁵³ Blaisius, the putative father, however, contested the adoption after having been established as the child's biological father.²⁵⁴ Subsequently, the putative father was adjudicated to be the child's biological father, and the

247. *Id.*

248. *Id.* (citing *B.H.*, 770 N.E.2d at 287).

249. *Id.*

250. *Id.* at 315. The appellate court noted that the trial court appropriately refrained from labeling the mother an "unfit" parent. *Id.*

251. *Id.*

252. 863 N.E.2d 1223, 1229 (Ind. Ct. App. 2007).

253. *Id.* at 1226.

254. *Id.*

adoption petition was denied.²⁵⁵ However, the trial court awarded custody of the child to the prospective adoptive parents as third party custodians.²⁵⁶ The father appealed.²⁵⁷

The father's argument on appeal was substantially the same as in *Truelove*.²⁵⁸ He argued that the trial court abused its discretion in awarding the third party custody of the child because it did not conclude and could not find "that he is unfit, that he abandoned [the child] [] or acquiesced in the [third party's] custody."²⁵⁹ Relying upon the court's determination in *Truelove*, the court "reiterat[ed] that evidence establishing the biological parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would be important, but the trial court is not limited to these criteria."²⁶⁰ Thus, the trial court did not abuse its discretion "despite not finding unfitness, abandonment, or acquiescence."²⁶¹

The father further argued, relying on *In re Guardianship of L.L.*,²⁶² that the trial court failed "to make a specific finding that separation from the [third party custodians] will cause [the child] long-term trauma."²⁶³ However, the court noted that the father's reliance on this case was misplaced:

[E]vidence sufficient to rebut the presumption may, but need not necessarily, consist of the parent's present unfitness, or past abandonment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child.²⁶⁴

Furthermore, the court noted that "[s]uch an upheaval, where it can only be said to have potential short-term effects, is insufficient to deny natural parent custody of his or her child."²⁶⁵

The court of appeals noted that the child's therapist testified that the separation would be very traumatizing to the child and "did not qualify his opinion by stating the effects would be merely short-term."²⁶⁶ An independent evaluation believed that the traumatic effect on the child would be much less severe than the child's therapist believed.²⁶⁷ However, because "the trial court clearly assigned greater weight to [the therapist's] prognostication," the court

255. *Id.*

256. *Id.* at 1226-27.

257. *Id.* at 1229.

258. *Id.* (citing *Truelove v. Truelove*, 855 N.E.2d 311 (Ind. Ct. App. 2006)).

259. *Id.* at 1230.

260. *Id.* (citing *Truelove*, 855 N.E.2d 311).

261. *Id.*

262. 745 N.E.2d 222 (Ind. Ct. App. 2001).

263. *Blasius*, 863 N.E.2d at 1230.

264. *Id.* at 1231 (citing *L.L.*, 745 N.E.2d at 230-31).

265. *Id.* (citing *L.L.*, 745 N.E.2d at 233).

266. *Id.*

267. *Id.*

would not reweigh the respective testimonies of the experts.²⁶⁸

In sum, the court of appeals found that the trial court was clearly convinced that placement with the third parties “represent[ed] a substantial and significant advantage to the child,” and therefore the court’s findings were not “clearly erroneous or . . . against the logic and effect of the evidence.”²⁶⁹

E. Parenting Time/Visitation Issues

1. *Admissibility of Hearsay Statements.*—In custody or visitation modifications involving small children, admissibility of statements purportedly made by those children is often at issue. Such was the dilemma confronted by the court in the case of *In re Paternity of H.R.M.*²⁷⁰ In this case, the father was allowed reasonable visitation, which was to be agreed upon by the parties.²⁷¹ Conflict and disagreement between the parties regarding the father’s visitation with the minor child, ensued with the mother petitioning the court to modify visitation.²⁷² The basis for this motion was the mother’s assertion that the father had sexually abused the parties’ child.²⁷³ Over the father’s objection the trial court allowed into evidence statements purportedly made by the child to one social worker and documents made by a second social worker.²⁷⁴ After the hearing, the trial court issued an order granting the mother’s motion and ordered the father’s visitation to be supervised.²⁷⁵ The father appealed arguing that the admission of the child’s purported statements constituted inadmissible hearsay that affected his substantial rights.²⁷⁶

In determining the issue of whether the statements made to the social worker constituted inadmissible hearsay, the court of appeals examined Indiana Evidence Rule 803(4).²⁷⁷ Rule 803(4) provides that hearsay evidence may be admitted if it consists of statements made for the purposes of medical treatment.²⁷⁸ As the court noted, the rationale for this rule is the assumption that people seeking medical treatment have a strong incentive to tell the truth and that, therefore,

268. *Id.*

269. *Id.*

270. 864 N.E.2d 442, 444 (Ind. Ct. App. 2007).

271. *Id.* at 445.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 446.

277. In pertinent part Rule 803(4) provides that “statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or the general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” are not excluded by the hearsay rule. IND. R. EVID. 803(4).

278. *Id.*

such statements are reliable.²⁷⁹ Statements made to non-physicians may be included under the rule so long as the person making the statement does so to advance a medical diagnosis or treatment.²⁸⁰ In this context, the court pointed out that it has been held that statements made to family therapists may be admitted pursuant to Rule 803(4) as long as a proper showing of reliability has been made.²⁸¹ Because the social worker specialized in working with abused children, the court concluded that statements made to her would fall within the scope of Rule 803(4).²⁸² Having determined that question, the court then looked to see whether the record revealed evidence that satisfied the two prong test for a proper showing of reliability.²⁸³ The court found that the statements to the social worker failed the first prong.²⁸⁴ The court observed:

Under this first prong, “the declarant must subjectively believe that he was making the statement for the purpose of receiving medical diagnosis or treatment.” Although sometimes this subjective belief may be readily inferred from the circumstances, “[w]here that inference is not obvious as in this case involving a young child brought to treatment by someone else, there must be evidence that the declarant understood the professional’s role in order to trigger the motivation to provide truthful information.”²⁸⁵

The court concluded that “the record contains no indication that [the child] had the requisite motivation to tell the truth, as no evidence indicates that she knew [the social worker’s] role or that she was being interviewed for the purpose of medical diagnosis.”²⁸⁶

Also admitted into evidence over the father’s objection were notes made by another social worker which contained hearsay statements attributed to the child.²⁸⁷ The court determined that these notes did not comply with the records of regularly conducted business activity exception to the hearsay rule found under Indiana Evidence Rule 803(6) because the records were not properly supported by testimony or an affidavit.²⁸⁸ In this case the records were

279. *H.R.M.*, 864 N.E.2d at 446.

280. *Id.*

281. *Id.*

282. *Id.* (citing *McClain v. State*, 675 N.E.2d 329, 331 (Ind. 1996)). The Indiana Supreme court noted that in determining whether a statement is admissible pursuant to Rule 803(4) the “courts engage in a two prong test: ‘1) is the declarant motivated to provide truthful information in order to promote diagnosis and treatment; and 2) is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment.’” *Id.* (quoting *McClain*, 675 N.E.2d at 331).

283. *Id.*

284. *Id.* at 447.

285. *Id.* at 446 (alteration in original) (quoting *McClain*, 675 N.E.2d at 331).

286. *Id.* at 447.

287. *Id.* at 448-50.

288. *Id.* Under Indiana Evidence Rule 803(6), otherwise inadmissible hearsay may be

accompanied by an affidavit.²⁸⁹ The father argued that the affidavit accompanying the business records was insufficient because it did not indicate that the statements were certified under oath.²⁹⁰ The court agreed.²⁹¹ The purported affidavit did not indicate before whom the affiant swore, to what she swore, that she took an oath, or that these statements were made under the penalty for perjury.²⁹² The court further noted that “[t]he chief test of the sufficiency of an affidavit is its ability to serve as a predicate for a perjury prosecution.”²⁹³ The court went on to note that the admission of this evidence affected the father’s substantial rights and, therefore, did not amount to mere harmless error.²⁹⁴

2. *Grandparent Visitation*.—Two cases of interest during the survey period dealt with grandparent visitation issues.²⁹⁵ Indiana has enacted the Grandparent Visitation Act which is codified at Indiana Code section 31-17-5-1.²⁹⁶ Under the Indiana Grandparent Visitation Act, if the court determines that visitation with the grandparents is in the best interests of the child it may order such visitation.²⁹⁷ Indiana Code section 31-17-5-6 provides that when a trial court issues an order on a petition for grandparent visitation, it must issue findings and conclusions.²⁹⁸ In the case of *McCune v. Frey*,²⁹⁹ the court set forth four factors that must be specifically addressed in those findings of fact and conclusions of law.³⁰⁰ In *Ramsey*, the father had denied maternal grandparents visitation with the minor child of the parties for several reasons.³⁰¹ Among those reasons was that great

admitted if it consists of records of regularly conducted business activity. IND. R. EVID. 803(6). Such evidence must be supported by testimony or an affidavit, made under oath, indicating that such records were kept in the normal course of business and that it was the regular practice of the business to make such records. *Id.*

289. *Gaddie*, 864 N.E.2d at 448.

290. *Id.*

291. *Id.*

292. *Id.* at 449.

293. *Id.* at 448 (quoting *Jordan v. Deery*, 609 N.E.2d 1104, 1110 (Ind. 1993)).

294. *Id.* at 451.

295. See *Ramsey v. Ramsey*, 863 N.E.2d 1232 (Ind. Ct. App. 2007); *Shady v. Shady*, 858 N.E.2d 128 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 451 (Ind. 2007).

296. See Michael G. Ruppert & Joseph W. Ruppert, *Recent Developments: Indiana Family Law*, 38 IND. L. REV. 1085, 1096-98 (2005) (discussing the Indiana Grandparent Visitation Act).

297. IND. CODE § 31-17-5-2 to -10 (2004 & Supp. 2007).

298. *Id.* § 31-17-5-6.

299. 783 N.E.2d 752, 755 (Ind. Ct. App. 2003).

300. The four factors are:

1) the presumption that a fit parent acts in his or her child’s best interests; 2) the special weight that must be given to a fit parent’s decision to deny or limit visitation; 3) whether the grandparent has established that visitation is in the child’s best interests; and 4) whether the parent has denied visitation or has simply limited visitation.

Id. at 575.

301. *Ramsey v. Ramsey*, 863 N.E.2d 1232, 1240 (Ind. Ct. App. 2007). This animosity

animosity existed on the part of the maternal grandparents against the father.³⁰² The maternal grandparents had been active participants in allowing the mother to remove the minor child from the State of Indiana and keeping the child's location a secret for a period of time.³⁰³ After a hearing, the trial court granted the maternal grandparents' petition for visitation and issued findings and conclusions along with its order.³⁰⁴

The father appealed, contending that the court failed to issue sufficient findings of fact and conclusions of law along with its order.³⁰⁵ In siding with the father, the court of appeals found that the trial court's findings and conclusions failed to comply with the requirements of *McCune* by not specifically addressing the four factors required by *McCune*.³⁰⁶ The court strongly noted the importance in a grandparent visitation case for the trial court to not only issue findings of fact and conclusions with its order as required by Indiana Code section 31-17-5-6, but also to specifically address the four factors established by *McCune*.³⁰⁷

3. *Factors to Be Considered in Visitation Awards*.—One of issues in the case of *Shady v. Shady*³⁰⁸ was whether a trial court was required to consider statutory factors listed in the child custody statute when determining a husband's parenting time with his child. In this case, the decree of dissolution awarded the mother legal and physical custody of the child, and father was granted supervised parenting time with the child.³⁰⁹ The husband, an Egyptian citizen, had his parenting time supervised based primarily upon the testimony of an expert in the field of international parental child abduction³¹⁰ and the wife's introduction into evidence as an exhibit the American Bar Association's publication, *Jurisdiction In Child Custody and Abduction Cases: A Judge's Guide to the UCCJA, PKPA and Hague Child Abduction Convention*.³¹¹ Basically, this evidence concluded that the father was a flight risk with the child.³¹² On appeal, the father argued that the trial court abused its discretion by failing to consider the statutory factors found in Indiana Code section 31-17-2-8.³¹³ The father tried to convince the court that the factors in section 31-17-2-8 are factors the trial court must consider

manifested itself in the maternal grandparents accusing the father of illegal and immoral acts. *Id.*

302. *Id.*

303. *Id.* at 1234.

304. *Id.* at 1233.

305. *Id.*

306. *Id.* at 1238-39.

307. *Id.*

308. 858 N.E.2d 128, 130 (Ind. Ct. App. 2006), *trans. denied*, 864 N.E.2d 451 (Ind. 2007).

309. *Id.*

310. *Id.* at 132.

311. *Id.* at 136 (citing Patricia M. Hoff et al., *Jurisdiction in Child Custody Cases: A Judge's Guide to the UCCJA, PKPA, and the Hague Child Abduction Convention*, 48 JUV. & FAM. CT. J. 1 (1997)).

312. *Id.* at 136-37.

313. *Id.* at 139 (citing IND. CODE § 31-17-2-8 (2004)); *see also supra* note 193.

before entering an order determining custody and visitation.³¹⁴ The court of appeals observed that Indiana Code section 31-17-2-8 is clearly entitled “Custody Order” and that it sets forth the only factors that a trial court must consider in making a custody determination.³¹⁵ Additionally, the court noted that Indiana Code section 31-17-4-1, which

governs a trial court’s decision to award or deny parenting time, does not require the trial court to consider prescribed factors. Rather, it states, in relevant part, that “[a] parent not granted custody of the child is entitled to reasonable parenting time unless the [trial] court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child’s physical health or significantly impair the child’s development.” Whatever the value of a trial court considering the factors listed in [Indiana Code section] 31-17-2-8, if any, in making the parenting time determination, it is clear that such is not required, and, therefore, the trial court did not abuse its discretion by failing to consider those factors.³¹⁶

Based on this and other issues, the court of appeals affirmed the trial court’s decision.³¹⁷

F. Paternity

On July 1, 2006, several additions and changes to the Indiana paternity affidavit statute became effective.³¹⁸ Since the adoption of the new statute, a man who signs a paternity affidavit after the birth of a child is now considered to be the child’s legal father without requiring further court proceedings.³¹⁹ He is also afforded reasonable parenting time with the child unless a court determines otherwise.³²⁰ Once sixty days have elapsed after the execution of a paternity affidavit, it may only be rescinded in two instances:³²¹ (1) when there is a showing that there was “fraud, duress, or material mistake of fact bearing upon the execution of the paternity affidavit” or (2) when the rescission is requested by the man who signed the affidavit, and only then if that man was excluded as

314. *Shady*, 858 N.E.2d at 139.

315. *Id.*

316. *Id.* at 140.

317. *Id.* at 143. This case contains a very interesting discussion of the qualification of a witness as an expert witness in the field of international child abduction and also points out the dangers of failing to object to evidence at the trial level. *See id.* at 138-39. The father did not object to the introduction of the ABA publication. *Id.* at 138. On appeal the father could have claimed that the admission of the exhibit was fundamental error which would have excused the failure to object at trial; however, the father did not do that either. *Id.* at 138 n.5.

318. IND. CODE § 16-37-2-2.1 (Supp. 2007); *see* Ruppert & Sedberry, *supra* note 2, at 925 (discussing these changes).

319. IND. CODE § 16-37-2-2.1(m) (Supp. 2007).

320. *Id.* § 16-37-2-2.1(g)(2)(B).

321. *Id.* § 16-37-2-2.1(i).

the child's father after biological testing.³²² A paternity affidavit may only be set aside if genetic testing excludes the man who signed the affidavit as the child's father.³²³ A question raised in the case of *In re Paternity of Davis*,³²⁴ was: Does the existence of a paternity affidavit foreclose any attack upon the presumption of paternity created thereby except through the procedure set out in Indiana Code section 16-37-2-2.1?³²⁵

In *Davis*, the county prosecutor's office filed a petition to establish paternity in *Davis*.³²⁶ The court ordered genetic testing and the results indicated a 99.9943% chance that Davis was the biological father.³²⁷ However, at the time of the child's birth, the mother had another man execute a paternity affidavit.³²⁸ This paternity affidavit was neither set aside nor was it contested by the man who had signed the affidavit.³²⁹ After the paternity hearing the court found Davis to be the father, and he appealed.³³⁰ On appeal he argued that the existence of the paternity affidavit foreclosed any attack upon the presumption of paternity created thereby because the procedure set out in Indiana Code section 16-37-2-2.1 had not been followed.³³¹ The court of appeals affirmed the trial court, concluding that the action brought by the county prosecutor was not governed by the paternity affidavit statute, but instead by Indiana Code sections 31-14-4 and 31-14-6-1.³³² The court noted that according to Indiana Code section 31-14-2-1 a man's paternity may only be established in one of two ways: "(1) in an action under [Indiana Code section 31-14] or (2) by executing a paternity affidavit in accordance with [Indiana Code section] 16-37-2-2.1."³³³ The court went on to explain that "[t]he methods available to negate the affidavit vary depending upon the identity of the party that wishes to rebut paternity."³³⁴ If the man who executed the affidavit seeks to rebut the affidavit, he must do so under Indiana Code section 16-37-2-2.1.³³⁵ However, an entity, such as a prosecutor's office, may file a paternity action under Indiana Code section 31-14-4-1.³³⁶ This is what happened in this case, and while paternity was initially established via a paternity affidavit under Indiana Code section 16-37-2-2.1, the order of the trial court

322. *Id.* The fathers have sixty days after execution of the paternity affidavit to request the court to order genetic testing. *Id.* § 16-37-2-2.1(h).

323. *Id.* § 16-37-2-2.1(k).

324. 862 N.E.2d 308, 312-13 (Ind. Ct. App. 2007).

325. *Id.*

326. *Id.* at 310.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 311.

331. *Id.* at 312.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 313.

336. *Id.*

changed the initial status and established paternity in *Davis* under Indiana Code section 31-14-4.³³⁷ The court of appeals rejected Davis's call for them to declare that Indiana Code section 16-34-2-2.1 "trumps" Indiana Code section 31-14-4, finding that the two statutes could be reconciled and the proper legislative intent be determined.³³⁸

Along the same lines as *Davis*, the court also decided the case of *In re Paternity of E.M.L.G.*³³⁹ In this case the putative fathers had each executed paternity affidavits and allowed the sixty-day time period to expire without filing a request for genetic testing under Indiana Code section 16-37-2-2.1.³⁴⁰ The county prosecutor's office brought an action to establish a child support order based on each father's execution of a paternity affidavit, and a hearing was conducted by the trial court.³⁴¹ At the child support hearings each of the putative fathers "requested the court to order genetic testing," which the trial court granted.³⁴² The state filed motions to correct error for each case; upon denial by the trial court, the state appealed.³⁴³

On appeal, the court framed the issue as "whether the trial court properly granted four putative fathers' requests for genetic testing to disestablish paternity under Indiana Code section 31-14-6-1."³⁴⁴ As the court stated, Indiana Code section 31-14-6-1 provides that "[u]pon the motion of any party, the court shall order all the parties to a paternity action to undergo blood or genetic testing."³⁴⁵ The prosecutor's office had labeled these proceedings as support matters, but the trial court treated them as an establishment of paternity.³⁴⁶ In rejecting the trial court's logic the court of appeals noted that

Indiana Code section 31-14-2-1 (1998) provides for two ways to establish paternity: "(1) in an action under [article 14 governing proceedings for establishing paternity] or (2) by executing a paternity affidavit in accordance with [Indiana Code section] 16-37-2-2.1." (Emphasis added). Furthermore, Indiana Code [s]ection 31-14-7-3

337. *Id.*

338. *Id.*

339. 863 N.E.2d 867 (Ind. Ct. App. 2007). This appeal combined four similar cases. *Id.* at 868.

340. *Id.* at 869. All the paternity affidavits were signed before the July 1, 2006 effective date of the amendments to Indiana Code section 16-37-2-2.1 by P.L. 145-2006. *Id.* at 869 n.2. Therefore, the court had to rely on the version of the statute in existence before such amendments became effective. *Id.*; see *Martin v. State*, 774 N.E.2d 43, 44 (Ind. 2002).

341. *E.M.L.G.*, 863 N.E.2d at 868. "Each hearing was conducted more than sixty days after the father had executed a paternity affidavit." *Id.*

342. *Id.* "Even though these were child support hearings, the trial court stated that it treated such support hearings as hearings to establish paternity." *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 869 (quoting IND. CODE § 31-14-6-1 (1998)).

346. *Id.*

(2001) provides that “[a] man is a child’s legal father if the man executed a paternity affidavit in accordance with Indiana Code [s]ection 16-37-2-2.1 and the paternity affidavit has not been rescinded or set aside under Indiana Code section 16-37-2-2.1.” To rescind or set aside a paternity affidavit, a putative father may “within sixty (60) days of the date a paternity affidavit is executed . . . file an action in a court with jurisdiction over paternity to request an order for a genetic test.”³⁴⁷

Because the fathers had signed paternity affidavits pursuant to the statute and did not rescind or set aside the affidavits within the sixty-day time frame provided for under Indiana Code section 16-37-2-2.1, the court reasoned that, “under the plain, unambiguous language of the statute,” paternity [had] already [been] established” prior to the hearings even being conducted.³⁴⁸ None of the putative fathers had sought to set aside the paternity affidavits on the grounds of fraud, duress, or material mistake of fact, but “the trial court rescinded the paternity affidavits on the grounds that the men were allegedly not aware of the legal ramifications of the document when they signed the paternity affidavits.”³⁴⁹ The court rejected this position of the trial court, holding that such was “not a valid statutory reason for setting aside the paternity affidavits.”³⁵⁰ The court went on to note that the trial below amounted to nothing more than an action to disestablish paternity.³⁵¹ The court pointed out that “[t]he Indiana code has no provision for the filing of an action to disestablish paternity.”³⁵² The court of appeals stated that under the paternity statutes a trial court does not have the authority to treat child support proceedings as proceedings to disestablish paternity.³⁵³ The matter was reversed and remanded to the trial court.³⁵⁴

In re Paternity of C.M.R.,³⁵⁵ the court decided that an order for genetic

347. *Id.* (alteration in original) (quoting IND. CODE § 16-37-2-2.1 (2001)).

348. *Id.*

Indiana Code section 16-37-2-2.1(i) further provides that: “[a] paternity affidavit that is properly executed under this section may not be rescinded more than sixty (60) days after the paternity affidavit is executed unless a court has determined that fraud, duress, or material mistake of fact existed in the execution of the paternity affidavit.”

Id.

349. *Id.*

350. *Id.* It appears that ignorance of the law is not a defense. *Id.*

351. *Id.*

352. *Id.* (alteration in original) (quoting *In re Paternity of H.J.B.*, 829 N.E.2d 157, 159 (Ind. Ct. App. 2005)).

353. *Id.* at 870. “Indiana’s paternity statutes were created to avoid such an outcome, which could carry with it countless ‘detrimental emotional and financial effect[s].’” *Id.* (alteration in original) (quoting *Johnson Controls, Inc. v. Forrester*, 704 N.E.2d 1082, 1085 (Ind. Ct. App. 1999)). The court noted that “[i]f genetic testing were to disestablish paternity, then each child would be considered a ‘filius nullius,’ which in Latin means a son of nobody.” *Id.*

354. *Id.* at 871.

355. 871 N.E.2d 346, 351 (Ind. Ct. App. 2007).

testing is void where there is a failure to join necessary parties. In this case the county prosecutor brought an action to determine the paternity of C.M.R.³⁵⁶ The putative father was deceased when the trial court ordered the genetic testing of the father's former girlfriend and her two children to determine if their deceased father was the father of C.M.R.³⁵⁷ The former girlfriend appealed the trial court's order for genetic testing of her and her two children.³⁵⁸

On appeal, the court found that several necessary parties had not been joined in the paternity action.³⁵⁹ The court noted that "Indiana Code [s]ection 31-14-5-6 provides that 'the child, the child's mother, and each person alleged to be the father are necessary parties to each [paternity] action.' 'A necessary party is one who must be joined in the action for a just adjudication.'"³⁶⁰ The court observed that the State had not petitioned to open the putative father's estate so that its interest and the interest of its heirs could be presented.³⁶¹ Therefore, the order for genetic testing was void.³⁶²

As for the former girlfriend, the court pointed out that "Indiana Code Section 31-14-6-1 contemplates that only parties to a paternity action may be ordered to undergo genetic testing."³⁶³ As for her children, the court stated that "[t]he record suggest[ed] that they would be necessary parties to the action" because they are collecting or receiving their father's survivor benefits, but since C.M.R. may very well claim some of those benefits they should be given an opportunity to appear, answer, and defend their interests.³⁶⁴

In conclusion, the court found that the order for genetic testing was void due to a failure to join necessary parties and on remand instructed the trial court to determine which of the participants should be joined as parties, and to have those parties served, and to give them an opportunity to appear, answer, and defend.³⁶⁵

G. Miscellaneous Issues

1. *Child's Name*.—During the survey period two cases involving the surname of a child in a paternity context were decided.

The first case, *In re Change of Name of Fetkavich*,³⁶⁶ involved a matter of first impression as to who is a necessary party in a proceeding to change a child's surname. In this case the mother petitioned the court to change the surname of

356. *Id.* at 347-48.

357. *Id.* at 347. The mother of C.M.R. is not the same person as the father's former girlfriend.
Id.

358. *Id.* at 348-49.

359. *Id.* at 349.

360. *Id.* (quoting *In re Paternity of H.J.F.*, 634 N.E.2d 551, 552 (Ind. Ct. App. 1994)).

361. *Id.* at 350.

362. *Id.*

363. *Id.*

364. *Id.* at 350-51.

365. *Id.* at 351.

366. 855 N.E.2d 751, 754-55 (Ind. Ct. App. 2006).

her minor son to that of his stepfather.³⁶⁷ The mother and father were never married, and the child never bore the father's last name.³⁶⁸ At the time of the filing of the petition, the mother was using the stepfather's surname, and the child's surname appeared to be the mother's maiden name, although that was not clear from the court's opinion.³⁶⁹ The father had visited the child "ten to twenty times in his lifetime," and had created an irrevocable trust with \$280,000 to provide child support for the child.³⁷⁰

The court held a hearing on the petition at which the father was represented by counsel.³⁷¹ The trial court granted a request for a separation of witnesses which had the unlikely result of the trial court ordering the father out of the court room until after he had testified.³⁷² At the conclusion of the hearing the trial court issued an order granting the request to change the child's last name to that of his stepfather.³⁷³

The dispositive issue on appeal was whether the trial court committed reversible error by preventing the father from being present in court during the hearing.³⁷⁴ The father contended that he was "not a mere witness at the hearing but that he was a party" to the action and "had a right to be in court during the hearing."³⁷⁵ In reversing, the court of appeals noted that "[t]he definition of 'party' in the context of a name change proceeding is a matter of first impression for this court."³⁷⁶ If the father was a necessary party to the name change then his exclusion from the courtroom by the trial court constituted reversible error.³⁷⁷

In determining that both parents are parties to an action to change a child's surname the court observed that Indiana case law recognizes that "[a] father and mother enjoy equal rights with regard to naming their child."³⁷⁸ The father enjoys a legal right with regard to naming his child and, pursuant to Indiana Trial Rule 19, is a necessary party to a proceeding regarding the change of his minor

367. *Id.* at 753.

368. *Id.* at 752.

369. *See id.*

370. *Id.* at 752-53. The last visit was two years before the name change and petition was filed by the mother. *Id.*

371. *Id.* at 753.

372. *Id.*

373. *Id.*

374. *Id.* at 754.

375. *Id.*

376. *Id.*

377. *Id.* at 755. The court of appeals relied on *Jordan v. Deery*, 778 N.E.2d 1264, 1272 (Ind. 2002), in which the Indiana Supreme Court noted the right of a party to an action to be personally present during trial is so universally understood to exist that "[c]itation of authority is not required to sustain the proposition." *Fetkavich*, 855 N.E.2d at 756 (alteration in original) (quoting *Jordan*, 778 N.E.2d at 1272)).

378. *Id.* at 755 (citing *Tibbitts v. Warren*, 668 N.E.2d 1266, 1267 (Ind. Ct. App. 1996); *In re the Change of Name of J.N.H.*, 659 N.E.2d 644, 646 (Ind. Ct. App. 1995)).

child's name.³⁷⁹

The second case regarding name change is *Petersen v. Burton*,³⁸⁰ which involved two interesting questions in the context of the surname of a minor child in a paternity proceeding. One issue was who bears the burden of proof and what that proof is.³⁸¹ The other issue was which parent the statutory presumption found in Indiana Code section 34-28-2-4(d) favors.³⁸² The father requested that the court change the child's surname to that of the father.³⁸³ The trial court granted the father's petition and changed the child's surname.³⁸⁴ The mother appealed.³⁸⁵

The court of appeals affirmed the trial court, determining that Indiana Code section 34-28-2-4(d) provides that "[a] biological father seeking to obtain a name change of his nonmarital child bears the burden of persuading the court that the change is in the child's best interests."³⁸⁶ The court also determined that "whether it is in the best interest for [such a child] to be given the father's surname when paternity has been established is an issue to be resolved on a case-by-case basis."³⁸⁷ Here the father satisfied that burden by convincing the court that his actions did "demonstrate a genuine desire to form a parent-child relationship."³⁸⁸ He consistently paid child support and exercised visitation on a "fairly regular" basis.³⁸⁹ The father testified that having the child bear his surname would foster the parent-child relationship and allow him to forge closer

379. *Id.* Indiana Trial Rule 19 provides that

a person who is subject to service of process shall be joined as a party if in the action if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest[.]"

Id. (quoting IND. TRIAL R. 19(A)(2)(a)).

380. 871 N.E.2d 1025, 1028 (Ind. Ct. App. 2007).

381. *Id.*

382. *Id.* Indiana Code section 34-28-2-4(d) states that

the trial court shall recognize a presumption in favor of the parent who (1) has been making support payments and fulfilling other duties in accordance with the decree issued under [the dissolution, child support, or custody and parenting time statutes]; and (2) objects to the proposed name change of the child.

Id. (quoting IND. CODE § 34-28-2-4(d) (2004)).

383. *Id.* at 1027. At the time of the father's petition the surname of the child was not the mother's surname by birth nor was it even her current last name. *Id.* at 1026-27. Rather it was the surname of the mother's stepfather. *Id.*

384. *Id.* at 1027.

385. *Id.*

386. *Id.* at 1029 (quoting *In re Paternity of Tibbitts*, 668 N.E.2d 1266, 1267-68 (Ind. Ct. App. 1996)).

387. *Id.* at 1029 (quoting *Tibbitts*, 668 N.E.2d at 1269).

388. *Id.*

389. *Id.* at 1029-30.

ties with his son.³⁹⁰

With respect to the presumption found in Indiana Code section 34-28-2-4(d), the mother argued that she was entitled to the presumption and that the father was required to overcome that presumption as well as her objection to the proposed name change of the child.³⁹¹ The father argued that “the presumption applies only to noncustodial parents who satisfy the statutory requirements.”³⁹² The court of appeals agreed, finding that: “Our research did not reveal any cases where the presumption has been applied to a custodial parent. For these reasons, we conclude that the presumption created in Indiana Code Section 34-28-2-4(d) does not apply to Mother, the custodial parent, in this case.”³⁹³

The court further observed that “[l]imiting the application of this statutory presumption to noncustodial parents, primarily fathers, . . . may appear outdated in light of modern attitudes and practices regarding surnames of children born out-of-wedlock,” but stated that “it is for the legislature . . . to make any revisions.”³⁹⁴

2. *Contempt*.—The Indiana Court of Appeals affirmed the trial court’s decision not to hold a mother in contempt for her failure to follow the court’s order not to smoke in the child’s presence in *Heagy v. Kean*.³⁹⁵ In determining whether the mother should be held in contempt of court, the trial court relied on Indiana Code section 34-47-3-1³⁹⁶ which makes a person guilty of contempt by an act that is a “willful disobedience” of an order.³⁹⁷ In this case, the mother stated that she did not realize she was violating the order at the time she was

390. *Id.* at 1030. The court further noted that the mother-child relationship is generally less affected by the child’s surname. *Id.* at 1029. The court observed that “[i]t is not necessary for a mother to come to court to establish her blood relationship to her own child” and that the origin of the mother-child relationship is inherently known. *Id.* (quoting *Tibbitts*, 668 N.E.2d at 1269). On the other hand, there is no such presumption for the father of a child born out-of-wedlock. *Id.* In order for that child “to inherit from the father or to receive the benefits of support and visitation, the father must be legally determined.” *Id.* (quoting *Tibbitts*, 668 N.E.2d at 1269). The legal determination of paternity provides practical benefits as well as symbolic ones. *Id.*

391. *Id.* at 1028.

392. *Id.*

393. *Id.*

394. *Id.* at 1028-29.

395. 864 N.E.2d 383, 385 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007).

396. Indiana Code section 34-47-3-1 provides:

A person who is guilty of any willful disobedience of any process, or any order lawfully issued:

- (1) by any court of record, or by the proper officer of the court;
- (2) under the authority of law, or the direction of the court; and
- (3) after the process or order has been served upon the person; is guilty of an indirect contempt of the court that issued the process or order.

Id. at 385-86 (quoting IND. CODE § 34-7-3-1 (2004)).

397. *Id.*

smoking around the child.³⁹⁸ Although the trial court ordered her to pay a portion of the father's attorney's fees for bringing the action, the mother was not held in contempt.³⁹⁹

The holding in *Heagy* and subsequent affirmation from the court of appeals could potentially provide an incentive for parents to argue that they did not willfully violate the courts order because they did not realize that they were doing so until after the fact.

III. CHILD SUPPORT

A. Modification

The court of appeals in *In re Marriage of Kraft*⁴⁰⁰ reversed the trial court's denial of a father's petition for modification of child support. The parties in *Kraft* modified their original agreement of settlement in 2004 with a mediated agreement regarding the father's weekly child support.⁴⁰¹ The agreement stated in part, "[t]his agreement is a compromise between the parties of several competing positions expressed during mediation and may not be consistent with the Indiana Child Support Guidelines."⁴⁰² Soon thereafter,⁴⁰³ the father filed a petition to modify his obligation on the basis of "a substantial and continuing change of circumstances regarding his employment."⁴⁰⁴ The trial court modified the father's child support obligation.⁴⁰⁵ On appeal, the court held that the father was not entitled to a modification after he failed to prove "changed circumstances so substantial and continuing" in nature as to make the previous order "unreasonable."⁴⁰⁶ Furthermore, the court held that he was not entitled to a modification because it had been less than twelve months since his previous child support order.⁴⁰⁷

398. *Id.* at 387-88.

399. *Id.* at 388.

400. 868 N.E.2d 1181, 1182 (Ind. Ct. App. 2007).

401. *Id.* at 1183.

402. *Id.*

403. October 27, 2004. *Id.*

404. *Id.* The father alleged that his salary had been significantly reduced to business restructuring and lost contracts. *Id.*

405. *Id.*

406. *Id.* at 1184 (quoting *Kraft v. Kraft*, 842 N.E.2d 895 (Ind. Ct. App. 2006) (unpublished table decision)). The court of appeals found that the father's company did not lose a contract that they previously held; they only failed to obtain the contract as they had hoped they would. *Id.* Furthermore, although the father "made a personal cut" to his annual salary, the "\$14,400.00 salary reduction does not independently establish that [f]ather sustained a 'continuing' reduction in income such that the existing order is 'unreasonable.'" *Id.* The court also looked at other factors such as the father's investments and significant home equity. *Id.*

407. *Id.* at 1185. See IND. CODE § 31-16-8-1 (Supp. 2007), which provides:

(a) Provisions of an order with respect to child support or an order for maintenance

Over a year later,⁴⁰⁸ the father filed another petition to modify his child support.⁴⁰⁹ The father's main contention in his petition was that he changed employment positions and was no longer able to make the additional income from bonuses as he had anticipated at the time of the mediated agreement.⁴¹⁰ The father appealed the trial court's denial of his petition.⁴¹¹ There was no dispute that the father met the requirements for the lapse of time and percentage of change required by statute.⁴¹² Because the father's child support order was based on a mediated agreement, the mother argued that prior Indiana case law⁴¹³ held that in order to receive a modification of child support the father was required to show "changed circumstances so substantial and continuing as to make the terms unreasonable."⁴¹⁴ In a very long opinion that analyzed prior decisions,⁴¹⁵ the court of appeals reversed the trial court's denial of the father's petition and remanded the matter to the trial court for proceedings consistent with its findings.⁴¹⁶ The court ultimately held that it did not matter whether the father's child support was based on a court hearing or a mediated agreement; the statute

(ordered under [Indiana Code section] 31-16-7-1 or [Indiana Code section] 31-1-11.5-9(c) before their repeal) may be modified or revoked.

(b) Except as provided in section 2 of this chapter, modification may be made only:

(1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or

(2) upon a showing that:

(A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and

(B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

(c) Modification under this section is subject to [Indiana Code section] 31-25-4-17(a)(6).

408. February 2, 2006. *In re Marriage of Kraft*, 868 N.E.2d at 1184.

409. *Id.*

410. *Id.* According to the mother, the father's "\$274,000.00 income in their mediation agreement was reached by taking a three-year average of his past incomes with bonuses." *Id.*

411. *Id.* at 1184-85. The trial court's decision will only be reversed upon a showing of abuse of discretion. *Id.* (citing *In re E.M.P.* 722 N.E.2d 349, 351 (Ind. Ct. App. 2000)).

412. *Id.*; see IND. CODE § 31-16-8-1 (Supp. 2007).

413. *Hay v. Hay*, 730 N.E.2d 787, 794 (Ind. Ct. App. 2000).

414. *Kraft*, 868 N.E.2d at 1186.

415. *Id.* at 1186-89. The language in *Hay* requiring modification upon showing substantial changed circumstances independent of the twenty percent deviation for modification was *dicta*. It is contrary to the clear language of Indiana Code section 31-16-8-1 (Supp. 2007). *Id.* at 1186-87. In light of the Indiana Supreme Court's language in *Meehan v. Meehan*, 425 N.E.2d 157, 160 (Ind. 1981), where the trial court was reversed for straying from the language of the support modification statute, the *dicta* in *Hay*, should be disregarded. *Kraft*, 868 N.E.2d at 1187-88.

416. *Kraft*, 868 N.E.2d at 1190.

should be interpreted the same in both situations.⁴¹⁷ The court of appeals further found that the father would have been entitled to a modification even if he was required to meet the requirements of a substantial and continuing change of circumstances.⁴¹⁸

B. Retroactive Modification

In *Whited v. Whited*,⁴¹⁹ the Indiana Supreme Court granted transfer of a portion of the court of appeals decision⁴²⁰ that retroactively modified a father's child support obligation to take into account the time the parties' children stayed with him.⁴²¹ Even though more than eleven years had passed since the emancipation of the youngest child subject to an in gross child support order, the change of custody exception to the rule against retroactive modification was not available due to the fact that at least one child remained living with the mother at all times.⁴²² The father was not entitled to a retroactive modification even though it could be shown that the father acted in good faith by reducing his in gross child support obligation proportionately based on the number of children residing with the mother at any one time.⁴²³ The court stated that "when a court enters an order in gross, that obligation similarly continues until the order is modified and/or set aside, or *all* of the children are emancipated, or *all* of the children reach the age of twenty-one."⁴²⁴ The court strongly suggested that it would be much simpler for parties to submit agreed modifications of child support in instances where the parties agree that in gross orders are no longer

417. *Id.* at 1189. The court of appeals agreed with the father's analysis that "parents [would be] less likely to reach such agreements regarding child support if they will have a 'tougher time changing the agreement later' and that 'having such an added burden would do nothing but discourage parents from ever agreeing to pay more than absolutely necessary.'" *Id.* (quoting Appellant's Brief, *Kraft*, 868 N.E.2d 1181 (No. 22A04-0612-CV-752)).

418. *Id.* at 1189-90. Even if the *dicta* in *Hay* were law, the excess support in the mediation agreement was based upon a compromised income almost three times greater than the income at the time of the hearing on the petition to modify. *Id.* Such a reduction in income amounts to a changed circumstance so substantial and continuing as to make the terms of the current order unreasonable. *Id.*

419. 859 N.E.2d 657 (Ind. 2007).

420. See Ruppert & Sedberry, *supra* note 2, at 916-17 (discussing *Whited* at both trial and appellate levels).

421. *Whited*, 859 N.E.2d at 660-61.

422. *Id.* at 663-64.

423. *Id.*

424. *Id.* at 661 (citing *Ogle v. Ogle*, 769 N.E.2d 644 (Ind. Ct. App. 2002); *Schrock v. Gonser*, 658 N.E.2d 615 (Ind. Ct. App. 1996)). Indiana has historically been very harsh in this area, even disallowing automatic reductions to in gross orders after the death of one of the children referenced in the order. *Id.* (citing *Nill v. Martin*, 686 N.E.2d 116, 118 (Ind. 1997); *Kaplon v. Harris*, 567 N.E.2d 1130, 1132-33 (Ind. 1991)).

representative of their situation.⁴²⁵

C. Credit for Social Security Retirement Benefits

Social Security benefits and their treatment have been a revolving and reoccurring issue with the Indiana courts.⁴²⁶ In *Thompson v. Thompson*,⁴²⁷ the court tried to reconcile prior Indiana Supreme Court and Indiana Court of Appeals decisions together with recognition of the fact that the Indiana Child Support Guidelines do not deal with third party sources of income paid directly to children. The *Thompson* court held that “a trial court abuses that discretion in setting support at a level that varies to such an extent from the standard of living that the child would have enjoyed had the family remained intact.”⁴²⁸ There is also an abuse of discretion where the amount of support ordered “devotes substantially higher percentages of total family income to such support for families receiving Social Security benefits than those that do not.”⁴²⁹

D. Post-secondary Educational Expenses

In *Quinn v. Threlkel*,⁴³⁰ the mother filed a petition for modification of the father’s child support and for a determination of responsibility for college expenses. In this case, the parties’ daughter attended a private college.⁴³¹ The daughter obtained student loans in addition to her scholarships and grants.⁴³² The father also contributed a substantial sum to tuition.⁴³³ Due to the mother having a spouse that could support her financially, the mother’s income was

425. *Id.*

426. The Indiana Supreme Court provided in *Brown v. Brown*, 849 N.E.2d 610, 612 (Ind. 2006), that “a disabled parent is entitled to a credit against the parent’s support obligations for Social Security disability benefits paid to a child” and in *Stultz v. Stultz*, 659 N.E.2d 125, 128 (Ind. 1995), “that such a credit is not automatic” for Social Security retirement benefits received by the minor child of divorcing parents. Rather, the receipt of such benefits is a factor to be considered by the trial court in setting support. *Id.* Note the main difference between *Brown* and *Stultz* is the type of benefit; *Brown* considers disability benefits, while *Stultz* focuses on retirement benefits. See *Brown*, 849 N.E.2d at 612; *Stultz*, 659 N.E.2d at 126.

427. 868 N.E.2d 862, 865-69 (Ind. Ct. App. 2007).

428. *Id.* at 869.

429. *Id.* This ruling only evaluates when the trial court has abused its discretion and does not provide practitioners with a clear cut way to calculate child support where Social Security benefits are involved. The practical analysis may be for practitioners to add any retirement benefits received by the parents and children into the combined family income to determine the benefit the child would be receiving if the family remained intact and then reduce the retiree’s child support obligation by the amount the child is receiving in retirement benefits.

430. 858 N.E.2d 665, 668 (Ind. Ct. App. 2006).

431. *Id.*

432. *Id.*

433. *Id.* The father had contributed “approximately \$6000 towards [the child’s] college expenses before the hearing.” *Id.*

substantially lower than the father's at the time of the hearing.⁴³⁴ At the father's request and without objection from the mother, the trial court awarded the child dependency tax exemption for the parties' daughter to the father beginning with the 2005 tax year.⁴³⁵ The trial court expressed strong disagreement with the parties' willingness to allow their daughter to obtain student loans when their combined incomes were over \$100,000 annually.⁴³⁶ The court went so far as to forbid the parents from allowing the child to take out any further student loans and required them to repay her current loans.⁴³⁷ The trial court also disagreed with the use of any post-secondary education worksheet to determine the father's support obligation while the child was home from college and staying with the mother.⁴³⁸ The father was ordered to pay support only in the weeks that the parties' daughter was at home for at least seven days,⁴³⁹ and the parties' contribution to college expenses was set at an arbitrary percentage.⁴⁴⁰

The court of appeals held that the trial court's failure to adopt one of the parties' verified, properly executed, post-secondary education worksheets or to base the college expense order on its findings using the methodology of the Child Support Guidelines was error and remanded it to the trial court.⁴⁴¹ The court of appeals also instructed the trial court to consider and apportion part of the expense to the child.⁴⁴² The trial court's scolding of parents for allowing the child to take out modest loans to invest in her own education was inappropriate,⁴⁴³ especially in light of the fact that subsidized loans cannot be obtained without a showing of need.⁴⁴⁴ Finally, after consideration of the relevant factors to be considered by trial courts in deciding who shall be entitled

434. *Id.* The father earned approximately \$86,000 in 2003, \$61,500 in 2004, and \$100,000 in 2005. *Id.* The mother was previously employed with a salary of \$34,000, but had an income of only \$10,000 in 2005. *Id.*

435. *Id.*

436. *Id.* at 669.

437. *Id.*

438. *Id.* The mother's residence was located very close to the daughter's college, and the mother reported that daughter visited home frequently. *Id.* at 668.

439. *Id.* The court of appeals was concerned about the potential for a tug-of-war involving the parties' daughter with the mother wanting her to visit so she would get child support and the father encouraging the opposite so he did not have to pay child support. *Id.* at 673.

440. *Id.* at 668, 671. The trial court ordered the father to pay seventy-one percent and the mother to pay twenty-nine percent, even though the trial court did not consider a post-secondary education worksheet. *Id.*

441. *Id.* at 671.

442. *Id.*

443. *Id.* at 672. The trial court was also directed to "reconsider its absolute prohibition against [the daughter] taking out any loans to help pay for her education at a private school, and especially its requirement that the parties repay the loans she already took out during the 2005-06 school year." *Id.*

444. *Id.* at 671-72.

to the tax exemption,⁴⁴⁵ the court of appeals held that the trial court did not abuse its discretion when it awarded the tax exemption for the parties' daughter to the father.⁴⁴⁶

*In re the Marriage of Hensley*⁴⁴⁷ was another post-secondary educational case during this survey period. The trial court in *Hensley* ordered the father to be responsible for eighty-six percent of the educational expenses of the parties' children⁴⁴⁸ and also ordered the father to reimburse the mother for over \$60,000 in past tuition for the children.⁴⁴⁹ After all of the support orders, including child support, were taken into consideration, the father would have been expected to support himself⁴⁵⁰ on less than \$4300 per year.⁴⁵¹ The court of appeals found this

445. The Indiana Child Support Rules and Guidelines section on tax exemptions provides:

Development of these Guidelines did not take into consideration the awarding of the income tax exemption. Instead, it is recommended that each case be reviewed on an individual basis and that a decision be made in the context of each case. Judges and practitioners should be aware that under current law the court cannot award an exemption to a parent, but the court may order a parent to release or sign over the exemption for one or more of the children to the other parent pursuant to I.R.C. s 152(e). To effect this release, the parent releasing the exemption must sign and deliver to the other parent I.R.S. Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents. The parent claiming the exemption must then file this form with his or her tax return. The release may be made, pursuant to the Internal Revenue Code, annually, for a specified number of years or permanently. Judges may wish to consider ordering the release to be executed on an annual basis, contingent upon support being current at the end of the calendar year for which the exemption is ordered as an additional incentive to keep support payments current. It may also be helpful to specify a date by which the release is to be delivered to the other parent each year. Shifting the exemption for minor children does not alter the filing status of either parent.

In determining when to order a release of exemptions, it is recommended that at minimum the following factors be considered:

- (1) the value of the exemption at the marginal tax rate of each parent;
- (2) the income of each parent;
- (3) the age of the child(ren) and how long the exemption will be available;
- (4) the percentage of the cost of supporting the child(ren) borne by each parent; and
- (5) the financial burden assumed by each parent under the property settlement in the case.

IND. CHILD SUPPORT GUIDELINES 6 cmt. (2004).

446. *Quinn*, 858 N.E.2d at 675-76.

447. 868 N.E.2d 910 (Ind. Ct. App. 2007).

448. *Id.* at 912. The mother's income was found to be \$210 per week (an imputation of minimum wage) and the father's income was \$1,286.87 per week, which is approximately eighty-six percent of the parties' total income. *Id.* at 914-15.

449. *Id.* at 916.

450. The court noted that the father was a hard worker, already working over sixty hours per week to support himself and his four children, while the mother was unemployed and would have

to be “inequitable and unjust”⁴⁵² in that the trial court failed to consider the parents’ ability to meet the needs as required by the Indiana Code.⁴⁵³

*E. Voluntary Underemployment and Irregular Income*⁴⁵⁴

*Meredith v. Meredith*⁴⁵⁵ reviewed the trial court’s finding that the father was voluntarily underemployed after he voluntarily took an early retirement in order to increase his monthly pension amount.⁴⁵⁶ The court affirmed the trial court’s decision and held that where a support payor voluntarily takes early retirement and does not seek new employment solely for the purpose of increasing his monthly retirement benefit and despite being able to work, the court of appeals will not reverse the trial court’s finding of voluntary unemployment.⁴⁵⁷

The *Meredith* court also analyzed the trial court’s calculation of the father’s potential income and held that the determination of potential income is *fact sensitive*.⁴⁵⁸ The Indiana Child Support Guidelines, however, suggest that the weekly gross income must be set at least at the minimum wage level.⁴⁵⁹ The trial court’s use of the father’s previous four years of tax returns, which included substantial irregular overtime pay, to average his income for purposes of determining potential income was an error under the circumstances.⁴⁶⁰ The father’s pension income plus minimum wage would be similar to his pre-

money to spare under the trial court’s order. *Id.* at 916-17. An affirmation of the trial courts order would have penalized hard work and rewarded the mother for remaining unemployed. *Id.* at 917.

451. *Id.* at 916.

452. *Id.*

453. *Id.* (citing IND. CODE § 31-16-6-2 (Supp. 2007)).

454. *Meredith v. Meredith*, 854 N.E.2d 942 (Ind. Ct. App. 2006), was decided on October 6, 2006, just after the close of the survey period for 2006. Due to it being a case of first impression, it was also discussed in last year’s edition of this Article. See Ruppert & Sedberry, *supra* note 2, at 919.

455. 854 N.E.2d 942, 945-46 (Ind. Ct. App. 2006).

456. *Meredith* is distinguishable from *In re Paternity of E.M.P.*, 722 N.E.2d 349 (Ind. Ct. App. 2000), due to the father’s ability to work in *Meredith* coupled with the fact that he did not seek new employment making a comparable income after his retirement. *Meredith*, 854 N.E.2d at 947-48.

457. *Id.*

458. *Id.* at 948-49.

459. *Id.* at 949. The Indiana Child Support Guidelines provide:

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor’s work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community. If there is no work history and no higher education or vocational training, it is suggested that weekly gross income be set at least at the federal minimum wage level.

IND. CHILD SUPPORT GUIDELINES 3(A)(3) cmt. (2004).

460. *Meredith*, 854 N.E.2d at 949.

retirement hourly wage without overtime.⁴⁶¹ Either of those amounts would have served as a proper basis for the father's potential income because both would reflect the fact that the father is voluntarily unemployed, but would not dictate that the father base his employment decisions strictly upon maintaining the prior amount of his income which included overtime pay.⁴⁶²

F. Imputation of Income During Incarceration

In *Lambert v. Lambert*,⁴⁶³ the Indiana Supreme Court reviewed an issue that was a matter of first impression at the appellate level.⁴⁶⁴ After reviewing the various approaches in other states on the issue of calculating child support during incarceration,⁴⁶⁵ the court of appeals' decision was vacated in part and affirmed in part, and the case remanded to the trial court. The court stated that "[w]hile our Child Support Guidelines obligate every parent to provide some support even when they have no apparent present income, it was error to set support based on employment income that plainly would not be there during incarceration."⁴⁶⁶ The supreme court agreed with the appellate court that "most criminal activity reflects a voluntary choice, and carries with it the potential for incarceration and consequent unemployment."⁴⁶⁷ However, the court went on to make a distinction between unemployment due to incarceration and unemployment that is voluntary by saying that "[t]he choice to commit a crime is so far removed from the decision to avoid child support obligations that it is inappropriate to consider them as identical."⁴⁶⁸

461. *Id.*

462. *Id.* at 949-50.

463. 861 N.E.2d 1176 (Ind. 2007).

464. See Ruppert & Sedberry, *supra* note 2, at 917-18 (discussing *Lambert* at both the trial and appellate levels).

465. *Lambert*, 861 N.E.2d at 1177-79. The court discussed *Leasure v. Leasure*, 549 A.2d 225, 227 (Pa. Super. Ct. 1988) and examined the Absolute Justification Rule approach. *Lambert*, 861 N.E.2d at 1178. *Leasure* was later disapproved by the Pennsylvania Supreme Court. See *Yerkes v. Yerkes*, 824 A.2d 1169, 1172 n.12 (Pa. 2003). Other states, such as Montana and Iowa, "have concluded that it is appropriate to impute pre-incarceration income to the non-custodial parent" and used the Imputation of Pre-Incarceration Income Allowed Rule. *Lambert*, 861 N.E.2d at 1178. These states focus mainly on "whether incarceration constitutes a voluntary reduction of income." *Id.* *Mooney v. Brennan* reasoned that "'a criminal should not be offered a reprieve from [his] child support obligations when we do not do the same for one who becomes voluntarily unemployed.'" *Id.* (alteration in original) (quoting *Mooney v. Brennan*, 848 P.2d 1020, 1022-23 (Mont. 1993)). The disallowing imputation of pre-incarceration income rule followed by Nebraska in *State v. Porter* states "that imposing pre-incarceration income on a felon would conflict with the state's child support guidelines precisely because an imprisoned individual had no 'earning capacity.'" *Id.* (quoting *State v. Porter*, 610 N.W.2d 23, 28-29 (Neb. 2000)).

466. *Lambert*, 861 N.E.2d at 1176.

467. *Id.*

468. *Id.* at 1180.

The court rejected the idea of suspending child support obligations while a parent is incarcerated as contrary to Indiana law.⁴⁶⁹ Rather, the court supported the idea of not imputing income but rather imposing the minimum support requirements provided by the Child Support Guidelines.⁴⁷⁰ The Indiana Supreme Court decision in *Lambert* only “counsels against imputing pre-incarceration wages, salaries, commissions, or other employment income to the individual. A court may, obviously, still consider other sources of income when calculating support payments.”⁴⁷¹ The court’s decision reminds its readers that “a court could prospectively order that child support return to the pre-incarceration level upon a prisoner’s release because following release, the parent is theoretically able to return to that wage level.”⁴⁷² The burden to modify would then fall on the previously incarcerated parent.⁴⁷³

G. Post-Divorce Support of a Guardianship Ward of the Parties

As a matter of first impression, the Indiana Supreme Court in *In re Marriage of Snow*⁴⁷⁴ held that the doctrine of *in loco parentis*⁴⁷⁵ should not be allowed to

469. *Id.* at 1179. Indiana Code section 31-16-6-6 provides the following:

(a) The duty to support a child under this chapter ceases when the child becomes twenty-one (21) years of age unless any of the following conditions occurs:

(1) The child is emancipated before becoming twenty-one (21) years of age. In this case the child support, except for the educational needs outlined in section 2(a)(1) of this chapter, terminates at the time of emancipation, although an order for educational needs may continue in effect until further order of the court.

IND. CODE § 31-16-6-6 (Supp. 2007).

470. *Lambert*, 861 N.E.2d at 1179-80. The Indiana Child Support Guideline provides:

The Guideline’s schedules for weekly support payments do not provide an amount of support for couples with combined weekly adjusted income of less than \$100.00. Consequently the Guidelines do not establish a minimum support obligation. Instead the facts of each individual case must be examined and support set in such a manner that the obligor is not denied a means of self-support at a subsistence level. It is, however, recommended that a specific amount of support be set. Even in situations where the noncustodial parent has no income, courts have routinely established a child support obligation at some minimum level. An obligor cannot be held in contempt for failure to pay support when there is no means to pay, but the obligation accrues and serves as a reimbursement if the obligor later acquires the ability to meet the obligation.

IND. CHILD SUPPORT GUIDELINES 2 cmt. (2004).

471. *Lambert*, 861 N.E.2d at 1182.

472. *Id.*

473. *Id.*

474. 862 N.E.2d 664, 667 (Ind. 2007).

475. “[A]dv. & adj. [Latin “in the place of a parent”] Acting as a temporary guardian of a child.” BLACK’S LAW DICTIONARY 791 (7th ed. 1999). *Niewiadomski v. United States* discusses *in loco parentis* by stating the doctrine ““refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through

impose an obligation to support a child on the adult standing *in loco parentis* after the relationship has ended. In other words, “when a relationship of *in loco parentis* exists, that status alone is an insufficient basis for imposing a child support obligation on the stand-in parent.”⁴⁷⁶ Because the voluntary agreement to contribute to the expenses of the child, post-divorce, should not be characterized as spousal maintenance capable of being ordered by a court or child support, the court determined the payments constituted an agreement concerning property distribution which is not modifiable absent fraud or a contractual provision between the parties permitting modification.⁴⁷⁷

H. Negative Child Support

In *Grant v. Hager*,⁴⁷⁸ the judgment of the trial court was reversed by the Indiana Supreme Court and the case was remanded to the trial court for further consideration. The court of appeals reversed the trial courts finding that the mother, the custodial parent, should pay child support to the father, the non-custodial parent, in an amount equal to the amount his credits for insurance and parenting time exceeded his child support obligation.⁴⁷⁹ The court’s holding was based on the deviation authority granted to courts by Child Support Rule 3.⁴⁸⁰ More specifically, the court stated that

[g]iven this deviation authority, a court could order a custodial parent to pay child support to a non-custodial parent based on their respective incomes and parenting time arrangements if the court had concluded that it would be unjust not to do so and the court had made the written

the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties.” *Snow*, 862 N.E.2d at 666 (quoting *Niewiadomski v. United States*, 159 F.2d 683, 686 (6th Cir. 1947)).

476. *Snow*, 862 N.E.2d at 667.

477. *Id.* at 667-68. The court came to its holding for several reasons, the first being that “Indiana policy disfavors entering a support order against adults who are not natural parents.” *Id.* at 667. “Second, it makes little sense to require child support from a person *in loco parentis* when that status is temporary in nature and essentially voluntary.” *Id.* The court went on to say “[i]t also seems unwise to create a layer of financial risk for adults who voluntarily provide financial and emotional support to children not their own.” *Id.* Furthermore, “it is difficult to imagine imposing parallel obligations on the institutions (like juvenile courts or universities) to which *in loco parentis* is commonly deployed.” *Id.*

478. 868 N.E.2d 801, 804 (Ind. 2007).

479. *Id.* at 802-03; see *Ruppert & Sedberry*, *supra* note 2, at 914-15 (discussing *Grant v. Hager* at both the trial court and appellate levels).

480. *Grant*, 868 N.E.2d at 803. Indiana Child Support Rule 3 states “[i]f the court concludes from the evidence in a particular case that the amount of the award reached through application of the guidelines would be unjust, the court shall enter a written finding articulating the factual circumstances supporting that conclusion.” *Id.* (quoting IND. CHILD SUPPORT GUIDELINES 3 (2004)).

finding mandated by Child. [sic] Supp. R. 3.⁴⁸¹

Following the Indiana Supreme Court's decision, which remanded the matter to the trial court for "reconsideration in accordance with the principles enunciated," the trial court issued an order in which it made specific findings, found that it would be unjust not to order support to be paid by the custodial mother, and reinstated retroactively its order awarding child support payable by the mother to the father in the amount of \$92.00 per week.⁴⁸² The mother then appealed this order contending that the trial court committed error by not holding a hearing prior to entering its findings of fact and judgment on remand.⁴⁸³ The mother further alleged that the court failed to rely on appropriate facts when concluding that the father had rebutted the presumptive child support obligation as calculated by using the Indiana Child Support Guidelines.⁴⁸⁴ The court of appeals affirmed the decision of the trial court and opined that it was not necessary for the trial court to hold a hearing because the supreme court had not instructed the trial court to conduct a new hearing.⁴⁸⁵ Regarding the mother's complaint that the trial court did not rely on appropriate facts, the court found that the trial court had relied upon the respective incomes of the parents, parenting time arrangements, and relevant payments being made by the parents to support its determination.⁴⁸⁶ Thus, the trial court followed the principles annunciated by the supreme court in its decision and committed no reversible error.⁴⁸⁷

IV. GUARDIANSHIP: INCAPACITATED ADULT

*In re Guardianship of Atkins*⁴⁸⁸ is an emotional case focusing on the best interests of an incapacitated, adult homosexual male.⁴⁸⁹ Patrick Atkins was in a twenty-five-year committed relationship⁴⁹⁰ when he became incapacitated as a result of a medical condition while on a business trip.⁴⁹¹ Patrick's life partner,

481. *Id.* at 804.

482. *Grant v. Hager*, 879 N.E.2d 628, 630-31 (Ind. Ct. App. 2008).

483. *Id.* at 631.

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

488. 868 N.E.2d 878 (Ind. Ct. App. 2007), *trans. denied*.

489. *Id.* at 880. While the sexual orientation of a person is not typically of noteworthy importance, it is of utmost importance in this case as it is the main reason for the disagreements over what is in Patrick's best interest.

490. *Id.* at 881. Patrick's family made it very clear through the years that they did not approve of Patrick's lifestyle. *Id.* at 880-81. Patrick's brother testified that his mother told him "that if Patrick was going to return to his life with Brett after recovering from the stroke, she would prefer that he not recover at all." *Id.* at 881.

491. *Id.* Patrick had an acute subarachnoid hemorrhage and a ruptured aneurysm. *Id.* He also suffered a stroke at some point during his hospital stay. *Id.*

Brett, traveled to Atlanta to be with Patrick at the hospital but was eventually excluded from visiting hours by Patrick's family.⁴⁹² After approximately six weeks in intensive care in Atlanta, Patrick was moved to a nursing facility.⁴⁹³ Brett developed a good relationship with the staff of the facility and continued to visit with Patrick after normal visiting hours so as not to be seen by Patrick's family.⁴⁹⁴ In June 2005, Brett filed a motion requesting to be Patrick's guardian, but Patrick's parents opposed the motion, making their own motion to be Patrick's guardians.⁴⁹⁵ Brett withdrew his request to be guardian over Patrick's property, but continued to seek appointment as the guardian over his person.⁴⁹⁶ Brett later petitioned the court⁴⁹⁷ for an "order requiring the Atkinses to allow him to visit and have contact with Patrick."⁴⁹⁸

The trial court named Patrick's parents, the Atkinses, as his co-guardians and denied Brett's request for the visitation order.⁴⁹⁹ The court of appeals⁵⁰⁰ affirmed the trial court's decision to name the Atkinses as Patrick's co-guardians,⁵⁰¹ but

492. *Id.* Although the family did not allow Brett to visit Patrick during visiting hours and went so far as to add a sign to the door of his room that read "immediate family and clergy only," the "hospital staff defied the family's instructions and allowed Brett to continue to visit with Patrick early in the morning and in the evenings, outside of regular visiting hours." *Id.*

493. *Id.*

494. *Id.* at 881-82.

495. *Id.* at 882.

496. *Id.*

497. *Id.* In November 2005, Brett filed a motion seeking the payment of a portion of his attorney's fees and costs from the guardianship estate. *Id.* The trial court denied his request, but the court of appeals remanded it to the trial court with instructions "to calculate the amount of Brett's attorney fees and costs to be paid by the guardianship estate" after finding that the fees were reasonably incurred in good faith and the expenditure of the fees was beneficial to Patrick. *Id.* at 888.

498. *Id.* at 882.

499. *Id.* at 882-83.

500. This case also involved the distribution of a Charles Schwab account that Patrick and Brett accumulated together over the past twenty-five years that was in Patrick's sole name. *Id.* The court of appeals upheld the trial court's decision to set the account aside to the guardianship estate. *Id.* at 887-88.

501. *Id.* at 883-84. The standard of review was whether the trial court abused its discretion in naming the Atkinses as co-guardians over Patrick. *Id.* at 883. Therefore, the court could not conduct a *de novo* analysis of what they felt was in the best interests of Patrick. *Id.* at 883-84. While they could not conclude there was an abuse of discretion on the part of the trial court, the court of appeals expressed some concern in saying

[g]iven the Atkinses' lack of support for their son's personal life through the years and given his mother's astonishing statement that she would rather that he *never recover* than see him return to his relationship with Brett, we are extraordinarily skeptical that the Atkinses are able to take care of Patrick's emotional needs.

Id.

reversed their decision to deny Brett visitation rights.⁵⁰² The court of appeals found that overwhelming evidence⁵⁰³ lead to the conclusion that visits between Patrick and Brett would be in Patrick's best interest and directed the trial court "to amend its order to grant Brett visitation and contact with Patrick as Brett requested."⁵⁰⁴

V. ADOPTION

A. Consent

The court of appeals in *In re Adoption of J.E.H.*⁵⁰⁵ affirmed the trial court's dismissal of a stepmother's petition to adopt her two stepchildren based on the lack of written consent by the oldest child, who was over the age of fourteen⁵⁰⁶ at the time of the hearing.⁵⁰⁷ The stepmother contended that the applicable statute⁵⁰⁸ was ambiguous as to whether consent is necessary when the child is not yet fourteen at the time of the petition but turns fourteen years of age before the adoption hearing.⁵⁰⁹ Both the trial court and the court of appeals disagreed with her rationale and held that the statute was clear and that her petition required written consent by the oldest child.⁵¹⁰

*In re Adoption of T.W.*⁵¹¹ involved the adoption of two children by their maternal great-uncle and great-aunt, Gary and Rachel Silbernagel, after the children were temporarily placed in their care.⁵¹² The Silbernagels obtained temporary guardianship over the children while Matthew White, their father was incarcerated. The Silbernagels sought counseling⁵¹³ for the children and denied

502. *Id.* at 884-86.

503. *Id.* at 885. The evidence included testimony from Patrick's guardian ad litem and an impartial neuropsychologist. *Id.* at 884-85.

504. *Id.* at 886. The court of appeals held that because "the Atkinses have made it crystal clear that, absent a court order requiring [them] to do so, they will not permit Brett to see their son, it was incumbent upon the trial court to order visitation as requested by Brett." *Id.*

505. 859 N.E.2d 388 (Ind. Ct. App. 2006).

506. The consent of the youngest child was not at issue as he was not yet fourteen years old. *Id.* at 389. However, because "it would not be in the best interests of W.D.H. to have a different mother than his older brother, the court also denied the adoption petition as to W.D.H." *Id.*

507. *Id.*

508. IND. CODE § 31-19-9-1(a)(5) (2004).

509. *J.E.H.*, 859 N.E.2d at 389-90.

510. *Id.* at 390.

511. 859 N.E.2d 1215 (Ind. Ct. App. 2006).

512. *Id.* at 1216-17. The Silbernagels were contacted by the father of the children and asked to care for them after he was unable to contact their mother while he was facing criminal prosecution. *Id.*

513. Psychological counseling was sought after the children began exhibiting sexualized behaviors and had emotional outbursts. *Id.* at 1216.

the father parenting time⁵¹⁴ with the children upon his release.⁵¹⁵ The Silbernagels petitioned the court for permanent guardianship over the children, which was set for hearing.⁵¹⁶ The father appeared at the hearing and requested parenting time with the children at his place of incarceration.⁵¹⁷ His request was denied, and the guardianship petition filed by the Silbernagels was granted.⁵¹⁸ After the hearing, the father ended all communication with the children.⁵¹⁹ Just under one year later, the Silbernagels petitioned to adopt the children.⁵²⁰ On December 29, 2005, their petition was granted.⁵²¹ The father appealed.

Indiana law waives the requirement of consent to the adoption of a child under certain circumstances, one of which is based on a voluntary lack of communication between a parent and child for a period of at least one year.⁵²² In this situation, while the court did not grant the father visitation with his children while he was incarcerated, nothing hindered his ability to communicate with the children by telephone or mail.⁵²³ The Silbernagels had the burden to prove by clear and convincing evidence that the father was unfit to be a parent to the children and that waiving his consent was in their best interests.⁵²⁴ The court of appeals affirmed the trial court's decision to grant the adoption and held that "there is clear and convincing evidence to support the trial court's determination of [the father's] parental unfitness, and that dispensing with his consent to the adoptions would serve the [c]hildren's best interests."⁵²⁵

B. Grandparent Visitation Rights After Parent's Adoption

As a matter of first impression before the court of appeals, *In re Guardianship of J.E.M.*⁵²⁶ addressed whether a mother's adoption by her second

514. The denial of parenting time was made pending an investigation into the behaviors by the children after reports of the allegations were made by the therapist. *Id.*

515. *Id.*

516. *Id.* at 1217. The hearing was on August 29, 2003. *Id.*

517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.* The petition was filed on August 16, 2004. *Id.* The trial court held hearings on their petition on August 17, 2005, October 12, 2005, and November 2, 2005. *Id.*

521. *Id.*

522. *Id.* (citing IND. CODE § 31-19-9-8 (a) (2004)).

523. *Id.* at 1218. The father asserted that he did not attempt to communicate via telephone or mail because the Silbernagels "would have thwarted his efforts." *Id.* While it is true that the court would have considered any such thwarting by the Silbernagels had it occurred, the court held the father's contentions that they would have done so when he had not put forth the effort was purely speculative. *Id.*

524. *Id.* at 1217-18 (citing IND. CODE § 31-19-9-8(a)(11) (2004); *In re Adoption of M.A.S.*, 815 N.E.2d 216, 219 (Ind. Ct. App. 2004)).

525. *Id.* at 1218-19.

526. 870 N.E.2d 517, 518 (Ind. Ct. App. 2007).

cousins could serve to sever the ties between her biological mother and her son. In *J.E.M.*, the child's biological grandmother, Handshoe, was appointed the child's guardian with his mother's consent in June 2002.⁵²⁷ The child resided with Handshoe until her guardianship was terminated in February 2005.⁵²⁸ At the time the guardianship was terminated, Handshoe was granted visitation rights of J.E.M.⁵²⁹ J.E.M.'s mother, Ridgway, was adopted by her second cousins, Jack and Joyce Mueller, in April 2005.⁵³⁰ Under the basis that Handshoe was no longer J.E.M.'s grandmother because his mother had been adopted, Ridgway filed a "Verified Motion for Termination of Grandparent Visitation" in September 2006.⁵³¹ The petition failed to make any claims regarding the termination of visitation being in the child's best interest.⁵³² The trial court granted Ridgway's motion and terminated Handshoe's visitations with J.E.M.⁵³³ Handshoe appealed the trial court's denial of her motion to correct error.⁵³⁴

Although Handshoe's original visitation order was not in compliance with the *Grandparent Visitation Act*,⁵³⁵ the court of appeals treated the order as if it had complied due to the lack of objection to the order at the time it was issued.⁵³⁶ Aside from statute,⁵³⁷ trial courts are directed by Indiana case law as well as the United States Supreme Court⁵³⁸ when it comes to the issue of grandparent visitation.⁵³⁹ Indiana court opinions also provide ample guidance and history in the area of a child's adoption and how that affects the rights of the grandparents.⁵⁴⁰ However, the "question of the effect of an adult *parent's* adoption on the ability of a biological grandparent to seek visitation with his or her grandchild" was a matter of first impression in Indiana.⁵⁴¹ The court of

527. *Id.*

528. *Id.*

529. *Id.* Handshoe was granted visitation privileges with the child one weekend per month. *Id.*

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.* at 518-19.

534. *Id.* at 519.

535. See IND. CODE § 31-17-5 (2004 & Supp. 2007).

536. *J.E.M.*, 870 N.E.2d at 519. The only issues were questions of law, not fact. *Id.* at 520. Therefore, the issues in this appeal would be handled de novo, with no deference to the trial court. *Id.* (citing *Harris v. Harris*, 800 N.E.2d 930, 935 (Ind. Ct. App. 2003)).

537. IND. CODE § 31-17-5-1(a)(3) (2004) (allowing grandparents to seek visitation with a grandchild born out of wedlock); *id.* § 31-17-5-2(a) (providing a court may grant grandparent visitation if it determines that visitation is in the best interests of the child); *id.* § 31-17-5-7 (providing grandparent visitation may be modified or terminated upon a finding of the child's best interests).

538. See *Troxel v. Granville*, 530 U.S. 57 (2000).

539. *J.E.M.*, 870 N.E.2d at 520.

540. *Id.* at 520-21.

541. *Id.* at 521.

appeals looked to Florida for guidance in this matter.⁵⁴² Ridgway requested that the court view her adoption as an adoption of her son as well, in effect severing the natural ties with Handshoe.⁵⁴³ The court of appeals disagreed with Ridgway's analysis and concluded that there was not an automatic severance of the relationship between Handshoe and J.E.M.⁵⁴⁴ The matter was remanded to the trial court for consideration under the best interests of the child standard presented by the Grandparents Visitation Act.⁵⁴⁵ The court of appeals noted that while there is not an automatic severance of ties between Handshoe and the child, the trial court may take the circumstances into consideration when looking at the best interests of the child.⁵⁴⁶ Furthermore, the court of appeals observed "that Handshoe would not be able to seek visitation with any children of Ridgeway [sic] born after her adoption by the Muellers."⁵⁴⁷

542. *Id.* A Florida court held that "the adoption of an adult who has children in being at the entry of judgment of adoption does not operate to sever the relationship of those children with their natural relatives." *Id.* (quoting *Worley v. Worley*, 534 So. 2d. 862, 863 (Fla. Dist. Ct. App. 1988)).

543. *Id.* at 522.

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.*

SURVEY OF RECENT DEVELOPMENTS IN HEALTH LAW

ICE MILLER LLP*

INTRODUCTION

This Survey summarizes recent developments in case law, legislation, and administrative actions that affect the health care industry. It summarizes a wide range of subjects including, among others, fraud and abuse, tax and reimbursement, and payment issues. Although not an exhaustive review, this Survey details the “hot” topics in the health care industry this year.

I. FRAUD AND ABUSE

A. *Stark III*

On September 5, 2007, the Centers for Medicare and Medicaid Services (“CMS”) published the Stark II Phase III (“Phase III”) final rule in the *Federal Register*.¹ Phase III does not create any new exceptions to the Stark Law; however, Phase III provides interpretation of the existing statutory exceptions and modifies some of the existing exceptions to the Stark Law.²

As a background, the Stark Law generally prohibits, absent qualifying for an exception, a physician from making a referral to an entity for the furnishing of any designated health services for which Medicare or Medicaid would otherwise pay, if the physician or member of the physician’s immediate family has a financial relationship with that entity (“DHS entity”).³ The Stark Law was effective January 1, 1992, for clinical laboratory services (“Stark I”)⁴ and January 1, 1995, for ten other designated health services (“Stark II”).⁵

The Stark Law contains significant civil sanctions for violations, including denial of payment, refunds of amounts collected in violation of the law, civil money penalties of up to \$15,000 for each offense, and exclusion from Medicare or Medicaid programs.⁶ In addition, if an individual enters into an arrangement or scheme that the person knows has the principal purpose of assuring referrals to an entity which, if the individual directly made to the entity would violate the Stark Law, the person is subject to a civil money penalty of up to \$100,000 for

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1. Physicians’ Referrals to Health Care Entities with Which They Have Financial Relationships (Phase III), 72 Fed. Reg. 51,012 (Sept. 5, 2007) (to be codified at 42 C.F.R. pts. 411 & 424) [hereinafter Phase III].

2. *See id.*

3. 42 U.S.C. § 1395nn (2000 & Supp. V 2005).

4. Pub. L. No. 103-66, § 13562(b), 1993 U.S.C.C.A.N. (107 Stat.) 312, 604 (codified as amended 42 U.S.C. § 1395nn).

5. *Id.*

6. 42 U.S.C. § 1395nn(g).

each such circumvention scheme.⁷

The agencies responsible for implementing the regulatory provisions for the Stark legislation are the CMS and the Office of the Inspector General ("OIG").⁸ CMS has been given the responsibility for developing regulations that set forth the specific policies by which conduct prohibited by the Stark Law is defined, while the OIG has maintained responsibility for imposing sanctions for violations of Stark Law.⁹ On March 31, 1995, the OIG issued final sanction regulations for the Stark Law, currently codified in 42 C.F.R. § 1003.¹⁰ In such regulations, the OIG incorporated the Omnibus Budget Reconciliation Act of 1993 and the Social Security Act of 1994 expansion to other designated health services into the final regulations for sanctioning improper claims and circumvention schemes.¹¹ On January 4, 2001, CMS published Phase I of the final Stark Law Regulations.¹² Phase I covers the general prohibition on certain referrals, the general exemption to both ownership and compensation arrangement prohibition, and related definitions.¹³ On March 26, 2004, CMS published Phase II of the final Stark Law Regulations.¹⁴ The Phase II Rules became effective July 26, 2004.¹⁵ On September 5, 2007, CMS published Phase III of the final Stark Law Regulations.¹⁶ Phase III became effective December 4, 2007.¹⁷ A brief summary of some of the interpretations and changes contained in Phase III are summarized below.

1. *"Stand in the Shoes Concept."*—In Phase III, CMS introduces a new concept, the "stand in the shoes" concept.¹⁸ Under this new concept, with respect to indirect compensation arrangements, the relationship between a physician and his or her physician organization is disregarded, and the physician "stands in the shoes" of his or her physician organization.¹⁹ Put another way, a physician associated with a physician organization "is deemed to have a direct

7. *Id.* § 1395nn(g)(4).

8. *See* HHS-OIG-Fraud Prevention & Detection-Enforcement Actions-Administrative Actions, <http://www.oig.hhs.gov/fraud/enforcement/administrative/cmp/cmp.html> (explaining that OIG can seek money penalties for statutory violations) (last visited Aug. 3, 2008).

9. *Id.*

10. 42 C.F.R. § 1003 (2007).

11. *Id.* § 1003.100(a) (explaining basis of the regulation).

12. Physicians' Referrals to Health Care Entities with Which They Have Financial Relationships, 66 Fed. Reg. 856 (Jan. 4, 2001) (to be codified at 42 C.F.R. pts. 411 & 424) [hereinafter Phase I].

13. *Id.*

14. Physicians' Referrals to Health Care Entities with Which They Have Financial Relationships (Phase II), 69 Fed. Reg. 16,054 (Mar. 26, 2004) (to be codified at 42 C.F.R. pts. 411 & 424) [hereinafter Phase II].

15. *Id.*

16. Phase III, *supra* note 1.

17. *Id.*

18. *Id.* at 51,028.

19. *Id.*

compensation arrangement with a [designated health services entity] if the only intervening entity between the physician and the [designated health services] entity is [the] physician organization.”²⁰ In effect, this change means that many arrangements that would have constituted an indirect compensation arrangement if analyzed under Phase I and Phase II of the Stark Law are now viewed as direct compensation arrangements and will have to be analyzed under Phase III to determine whether an applicable exception can be met in order for the physician to continue to make referrals to the DHS entity. The “stand in the shoes” provisions are effective as of the effective date of the Phase III final rule.²¹ Existing arrangements, however, do not need to be amended during the original or current renewal term of the agreement to comply with Phase III.²² At the expiration of the original or current renewal term of the existing arrangements, the arrangement must then be structured to comply with the requirements of Phase III.²³

2. *Physician Recruitment Exception.*—The physician recruitment exception exempts remuneration provided by a hospital to a physician “to induce the physician to relocate his or her practice to the geographic area served by the hospital in order to be a member of the hospital’s medical staff.”²⁴ Phase III expands this exception to cover rural health clinics.²⁵ Additionally, other significant changes to this exception were implemented through the Phase III regulations and are discussed below.

a. *Geographic area.*—CMS modified the manner in which hospitals determine the geographic area served by the hospital for purposes of this exception. Phase II provided that the exception required the recruited physician to relocate his or her practice to the area composed of “the lowest number of contiguous zip codes from which the hospital draws at least 75[%] of its inpatients.”²⁶ Phase III has not altered this requirement, but CMS has provided clarification that is beneficial to a hospital in determining its geographic area. The term “contiguous zip codes” includes zip codes that are contiguous to the zip code in which the hospital is located, and the term is also intended to include zip codes that are contiguous to each other.²⁷ For purposes of determining the geographic area which it serves, a hospital should examine its inpatient data and identify the lowest number of zip codes that touch at least one other zip code in which inpatients reside that comprise at least 75% of its inpatients at the time the parties execute the recruitment agreement.²⁸ If a hospital can achieve the 75% threshold of inpatient admissions through multiple configurations, it may use any

20. *Id.*

21. *Id.* at 51,012 (listing the effective date as December 4, 2007).

22. *Id.* at 51,028.

23. *Id.*

24. 42 C.F.R. § 411.357(e) (2007).

25. Phase III, *supra* note 1, at 51,048.

26. *Id.* at 51,049.

27. *Id.* at 51,050.

28. *Id.*

of the configurations.²⁹ In the event a hospital does not draw at least 75% of its inpatients from all of the contiguous zip codes from which it draws inpatients, then the hospital's geographic area would be all of the contiguous zip codes from which it draws its inpatients.³⁰ Furthermore, CMS provided that a hospital may recruit a physician to a zip code from which it draws no inpatients if that zip code is entirely surrounded by contiguous zip codes from which the hospital draws at least 75% of its inpatients (i.e., a zip code "hole" in the contiguous area).³¹

In response to commentary urging CMS to provide different requirements for recruiting physicians to outlying areas, CMS has expanded the definition of geographic area served by hospitals located in rural areas. A rural area is defined as an area that does not constitute a metropolitan statistical area.³² For a hospital located in a rural area, it may determine the geographic area it serves based on "the lowest number of contiguous zip codes from which it draws at least 90[%] of its inpatients."³³ Where a hospital in a rural area "draws fewer than 90% of its inpatients from all of the contiguous zip codes from which it draws inpatients," the hospital's geographic "may include non-contiguous zip codes, beginning with the non-contiguous zip code area in which the highest percentage of the hospital's inpatients reside[], and continuing" the process of adding non-contiguous zip code areas based on the order of descending percentages of inpatients.³⁴ In addition to this special rule for rural hospitals, such hospitals may also determine the geographic areas in which they serve based on the alternative "methodologies applicable to all hospitals."

Pursuant to Phase III modifications, CMS now permits rural health clinics, rural hospitals, and federally qualified health centers to recruit physicians to areas outside of the geographic area they serve if the facility satisfies all other requirements of the exception and the facility establishes a demonstrable need for the recruited physician's services as determined by the Secretary of the Department of Health and Human Services through the advisory opinion process.³⁵

b. Relocation requirement.—The Phase II regulations created some confusion regarding the relocation requirement of the physician recruitment exception, and CMS attempted to clarify this issue through the Phase III comments.³⁶ The exception requires that the recruited physician relocate his or her practice to the geographic area served by the hospital.³⁷ In order for a recruited physician to satisfy this requirement, the recruited physician must

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 51,042.

33. *Id.* at 51,049-50.

34. *Id.* at 51,050.

35. *Id.* at 51,056.

36. *Id.* at 51,050.

37. *Id.*

comply with both aspects of the requirement.³⁸ First, the recruited physician must move his or her practice from outside of the hospital's geographic area into the hospital's geographic area.³⁹ Second, the recruited physician must either move his or her practice at least twenty-five miles or "derive at least 75[%] of his or her practice's revenues from . . . new patients."⁴⁰ CMS has exempted certain individuals from the relocation requirement. In Phase II, CMS provided that residents and physicians who have been in practice one year or less would not be considered to have an established medical practice to relocate.⁴¹ Recruitment arrangements with such physicians could qualify for the exception regardless of whether the recruited physician moved his or her practice location, so long as all other requirements of the exception were met.⁴² CMS has clarified that for purposes of this exception, the term resident "includes all training, including post-residency fellowships."⁴³

c. Recruitment arrangements involving group practices.—Another aspect of the physician recruitment exception in which CMS made significant changes was to arrangements between the recruited physician and a physician practice. The two significant areas that were addressed by CMS were practice restrictions and income guarantees.

In Phase II, CMS prohibited physician practices from imposing additional practice restrictions in recruiting arrangements with recruited physicians that were not related to quality of care.⁴⁴ Specifically, CMS indicated that non-compete restrictions were categorically impermissible.⁴⁵ CMS received substantial commentary suggesting that such prohibitions created significant obstacles for recruiting and created confusion for physician practices regarding the type of practice restrictions that were prohibited.⁴⁶ Based on these "unintended results," CMS revised the language of the exception to prevent physician practices from imposing only those "restrictions that unreasonably restrict the recruited physician's ability to practice medicine in the geographic area served by the hospital."⁴⁷ As guidance for this revision, CMS provided examples of restrictions that it would not consider unreasonable restrictions having a substantial effect on the recruited physician's ability to remain and practice medicine in the hospital's geographic area after leaving the practice group: (1) "restrictions on moonlighting"; (2) "[p]rohibitions on soliciting patients and/or employees of the physician practice"; (3) requirements that "the recruited physician not use confidential or proprietary information of the

38. *Id.*

39. *Id.*

40. *Id.*

41. Phase II, *supra* note 14, at 16,094-95.

42. *Id.*

43. Phase III, *supra* note 1, at 51,051.

44. Phase II, *supra* note 14, at 16,096-97.

45. *Id.*

46. Phase III, *supra* note 1, at 51,053.

47. *Id.* at 51,054.

physician practice”; (4) requirements that “the recruited physician . . . repay losses of his or her practice that are absorbed by the physician practice in excess of any hospital recruitment payments”; and (5) requirements that “the recruited physician pay a predetermined amount of reasonable damages ([i.e.,] liquidated damages) if the physician leaves the physician practice and remains in the community.”⁴⁸

The expansion of the regulation to prohibit only those practice restrictions that unreasonably restrict the recruited physician’s ability to practice medicine in the geographic area served by the hospital is beneficial in the recruiting process, but the reasonableness standard imposes a burden on hospitals to pass judgment on the reasonableness of the practice restrictions imposed by physician practices. Furthermore, CMS addressed the Phase II prohibition of non-compete clauses in recruitment arrangements.⁴⁹ The purpose of the prohibition was to discourage physician practices that recruit physicians using hospital resources from impeding the recruited physician’s ability “to remain in the community and fulfill his or her obligations under the recruitment arrangement with the hospital.”⁵⁰ CMS, however, recognized that unless a physician practice was “able to impose a limited, reasonable non-compete clause,” it may face significant difficulty in recruiting or be “reluctant to hire additional physicians” even with financial assistance from hospitals.⁵¹ Although compliance with state and local non-compete laws is not required, CMS cautioned that any practice restrictions that do not satisfy applicable state and local laws “run a significant risk of being considered unreasonable.”⁵² CMS noted, however, that nothing in this section was intended to prevent a hospital from entering into an agreement with a physician practice that would prohibit the physician practice from imposing a non-compete provision or other practice restrictions on recruited physicians.⁵³

The recruitment exception also imposes restrictions on hospital-subsidized income guarantees.⁵⁴ Physician practices may not allocate more than “the group’s actual additional incremental costs attributable to the recruited physician” under an income guarantee.⁵⁵ CMS clarified that this limitation of actual additional incremental costs applies to any type of income guarantee, whether it is based on net income, gross income, revenues, or some other variation.⁵⁶ In addition, CMS established a narrow exception for a physician who is recruited to a rural area or Health Professional Shortage Area (“HPSA”) to replace a physician who, within the previous twelve months, has retired,

48. *Id.* at 51,053-54.

49. *See id.*

50. *Id.* at 51,054.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 51,052-53.

55. *Id.*

56. *Id.* at 51,052.

relocated outside the geographic area, or has died.⁵⁷ For purposes of an income guarantee in such situations, the physician group may “allocate to the recruited physician a per capita allocation of the practice’s aggregate overhead and other expenses”; however, this amount shall not “exceed 20[%] of the practice’s aggregate costs.”⁵⁸ CMS noted that this limitation applies only to hospital-subsidized income guarantees.⁵⁹ Where a physician practice uses its own funding to recruit physicians, the group is permitted to use any cost allocation method when compensating the recruited physician so long as the arrangement satisfies the requirements of an applicable exception (i.e., bona fide employment relationship exception or in-office ancillary services exception).⁶⁰ CMS identified the following examples of expenses that generally qualify as recruiting expenses: (1) “headhunter fees”; (2) “travel . . . and moving expenses associated with . . . recruitment”; (3) “employee benefits, taxes and professional fees attributable to hiring the recruited physician”; and (4) the cost of tail insurance covering the physician’s prior practice.⁶¹ CMS noted, however, these expenses are limited to those involved in the recruitment of the physician and do not include costs incurred after the physician is recruited and has joined the physician group.⁶² If a hospital pays a physician group for the time its physicians spend recruiting, then such compensation would have to satisfy one of the compensation exceptions (other than the recruitment exception) because such costs do not qualify as recruitment expenses for purposes of this exception.⁶³ Where compensation is made directly to the physician practice, CMS confirmed the requirement that the recruitment agreement must be signed by the hospital, the recruited physician, and the physician practice.⁶⁴ However, nothing in the regulation precludes the recruitment agreement from being executed in counterparts.⁶⁵

d. Other additional clarifications to the recruitment exception.—Following the Phase II regulations, there was confusion regarding the extent of the relocation exception afforded to residents.⁶⁶ In Phase III, CMS clarified that the requirement that the recruited physician join the hospital’s medical staff is a separate requirement from the relocation requirement.⁶⁷ Although residents are exempt from having to relocate their medical practice to the geographic area served by the hospital, residents must satisfy the requirement that they join the

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 51,051.

65. *Id.*

66. *Id.* at 51,048.

67. *Id.*

hospital's medical staff.⁶⁸ Therefore, in order to qualify for the recruitment exception, a "recruited physician cannot already be a member of the hospital's medical staff."⁶⁹

3. *Fair Market Value*.—In Phase III, CMS revised the fair market value exception to expressly exclude leases for office space.⁷⁰ In order to comply with the Stark Law, leases must comply with the rental of space exception located at 42 C.F.R. § 411.357(a).⁷¹ CMS also clarified that the fair market value exception applies to compensation paid by a referring physician to a DHS entity and to compensation paid by a DHS entity to a referring physician.⁷² CMS declined to elaborate on what constitutes fair market value or create a rebuttable presumption that all transactions are fair market value.⁷³ CMS stated,

The parties to a transaction or an arrangement are in the best position to ensure that the remuneration is at fair market value and to document it contemporaneously. If questioned by the government, the burden would be on the parties to explain how the transaction meets the fair market value compensation exception requirements.⁷⁴

Additionally, Phase III deletes the safe harbor that CMS established for hourly payments to physicians for personal services.⁷⁵ The Stark Law previously allowed physicians and hospitals to guarantee that hourly payments did not exceed fair market value by setting the payment at a rate less than or equal to the rate for emergency room physicians in the relevant physician market or the average of the fiftieth percentile of national compensation levels for physicians in the same specialty in at least four of six surveys.⁷⁶ In Phase III, CMS recognized that taking advantage of this safe harbor was almost impossible as several of the surveys no longer exist and that "it may be infeasible to obtain information regarding hourly rates for emergency room physicians at competitor hospitals."⁷⁷ Without the safe harbor, hospitals and physicians must independently determine whether a payment rate is consistent with fair market value based on the nature of transaction, its location, and other factors.

4. *Retention Payments*.—In Phase III, CMS provided some additional flexibility in efforts to retain physicians in underserved areas. A hospital, federally qualified health center, or a rural health clinic (all referred to as "hospital" below) may make payments to a physician on the hospital's medical staff to retain the physician's medical practice in the geographic area served by

68. *Id.*

69. *Id.*

70. *Id.* at 51,059.

71. *Id.*

72. *Id.*

73. *Id.* at 51,060.

74. *Id.*

75. *Id.* at 51,070.

76. *Id.* at 51,015.

77. *Id.*

the hospital if all the following conditions are met: (1) the physician has a bona fide firm, written recruitment offer or offer of employment from a hospital, academic medical center, or physician organization that is not related to the hospital making the payment; (2) the offer must specify the remuneration being offered and “require the physician to move the location of his or her medical practice at least [twenty-five] miles and outside of the geographic area served by the hospital making the retention payment”; (3) any retention payment must meet the requirements for recruitment payments: (i) in writing and signed by both parties; (ii) not conditioned on the physician’s referral of patients to the hospital; (iii) does not take into account the volume or value of any actual or anticipated referrals by the physician or other business generated between the parties; and (iv) the physician is allowed to establish staff privileges at any other hospitals and to refer business to any other entities; (4) “[a]ny retention payment must be subject to the same obligations and restrictions, if any, on repayment or forgiveness of indebtedness” as the written recruitment offer or offer of employment; and (5) the retention payment must not exceed the lower of: (i) “[t]he amount obtained by subtracting the physician’s current income from . . . the income the physician would receive from comparable physician” related services in the written recruitment or employment offer, “provided that the respective incomes are determined using a reasonable and consistent methodology and that they are calculated uniformly over no more than a [twenty-four]-month period”; or (ii) “the reasonable costs the hospital . . . would otherwise [incur] to recruit a new physician to the geographic area served by the hospital . . . to join the medical staff of the hospital . . . to replace the retained physician.”⁷⁸

Phase III has added another basis on which retention payments can be made to a physician. In addition to a bona fide written offer, a hospital can furnish such payments if it receives a written certification from a physician that the physician has a bona fide opportunity for future employment by a hospital, academic medical center, or a physician organization that requires the physician to move the location of his or her medical practice at least twenty-five miles and outside the geographic area served by the hospital.⁷⁹ The written certification must contain at least the following: (1) “details regarding the steps taken by the physician to obtain the employment opportunity; [(2)] details of the physician’s employment opportunity, including the identity and location of the physician’s future employer and/or employment location, and the . . . anticipated income and benefits (or a range of income and benefits)”; (3) certification “that the future employer is not related to the hospital . . . making the payment[s]; [(4)] the date on which the physician anticipates relocating his or her medical practice; and [(5)] information sufficient for the hospital . . . to verify the information included in the written certification.”⁸⁰ The hospital must verify that the physician has a bona fide opportunity for future employment that requires the physician to

78. *Id.* at 51,065.

79. *Id.* at 51,066.

80. *Id.*

relocate outside the geographic area served by the hospital.⁸¹ Any retention payment may not exceed the lower of: (1) “an amount equal to 25% of the physician’s current annual income” (measured over no more than a twenty-four-month period), “using a reasonable and consistent methodology that is calculated uniformly; or (2) the reasonable costs [that] the hospital would otherwise have to expend to recruit a new physician . . . to replace the retained physician.”⁸²

Any retention payment (whether pursuant to an actual written offer or a physician certification) must also meet the following requirements: “(1) the physician’s current medical practice has to be located in a rural area, a HPSA” (regardless of the physician’s specialty), in an area with demonstrated need for the physician as determined in an advisory opinion, or “at least 75[%] of the physician’s patients [must] reside in a medically underserved area or [be] members of a medically underserved population”; (2) the hospital must not enter into a retention arrangement with a particular referring physician more frequently than once every five years; (3) “the amount and terms of the retention payment must not be altered during the term of the arrangement in any manner that takes into account the volume or value of referrals or other business generated by the physician”; and (4) the arrangement must not violate the anti-kickback statute or any other applicable federal or state law.⁸³

5. *Temporary Non-Compliance*.—Subject to certain conditions detailed below, there is an exception for temporary noncompliance if: (1) the financial relationship between the entity and the referring physician fully complied with “an applicable exception for at least 180 consecutive calendar days immediately preceding the date on which the financial relationship become noncompliant; (2) the financial relationship fell out of compliance for reasons beyond” the control of the entity, and the entity promptly took steps to rectify “the noncompliance; and (3) the financial relationship does not violate the anti-kickback statute.”⁸⁴ This exception only applies to designated health services furnished during the period of “time it takes the entity to rectify the noncompliance, which must not exceed [ninety] consecutive calendar days following the date on which the financial relationship” becomes noncompliant with an exception.⁸⁵ In the Phase III preamble, CMS steadfastly rejected suggestions that this time period be extended such as a suggestion that the period run from the date of noncompliance until thirty or ninety days after the date the noncompliance was discovered. CMS stated, “A discovery-based rule is contrary to the statutory scheme. Moreover, such a rule creates a perverse incentive not to diligently monitor and enforce compliance.”⁸⁶ The temporary non-compliance exception may be used by an entity only “once every three years with respect to the same referring physician.”⁸⁷ Finally, this exception will not apply if the exception with which

81. *Id.*

82. *Id.*

83. *Id.* at 51,065-66.

84. *Id.* at 51,024 (citing 42 C.F.R. § 411.353(f) (2007)).

85. *Id.* (citing 42 C.F.R. § 411.353(f) (2007)).

86. *Id.* at 51,025.

87. *Id.* at 51,024.

the financial relationship previously complied related to the non-monetary compensation exception or the medical staff incidental benefits exception.⁸⁸

In the preamble to the Phase III regulations, CMS stated:

Entities should maintain adequate and contemporaneous documentation of all financial relationships with referring physicians, including: [(1)] [t]he terms of each arrangement; [(2)] [w]hether and how an arrangement fell out of compliance with an exception; [(3)] [t]he reasons for the arrangement falling out of compliance; [(4)] [s]teps taken to bring the arrangement into compliance; [(5)] [r]elevant dates; and [(6)] [s]imilar information.⁸⁹

6. *Amendment to Existing Agreements.*—In Phase III, CMS addressed the amendment of agreements between a DHS entity and a referring physician.⁹⁰ The concept applies to space and equipment leases and personal services agreements.⁹¹ In commentary, CMS stated that

parties may not change the rental charges at any time during the term of the agreement. Parties wishing to change the rental charges must terminate the agreement and enter into a new agreement with different rental charges and/or terms; however, the new agreement may be entered into only after the first year of the original . . . term.⁹²

Other provisions not impacting the rental charges or related provisions may be amended at any time so long as “the rental charges are not changed and [the] other requirements of the exception are satisfied.”⁹³ This concept also applies to terms regarding compensation under personal services agreements.⁹⁴

7. *Physicians and Group Practices.*—Phase III clarifies that independent contract physicians must furnish patient care services under a direct contract with the group, not between the group and another entity.⁹⁵ Additionally, Phase III states that independent contractors must perform services in a group facility in order to be considered a physician in the group practice.⁹⁶

B. *OIG Actions*

1. *Advisory Opinion 07-10: Hospital Payment to Physicians for On-Call and Indigent Care Services.*—On September 20, 2007, the U.S. Department of Health and Human Services, Office of Inspector General (OIG) issued Advisory Opinion

88. *Id.*

89. *Id.* at 51,026.

90. *Id.* at 51,044.

91. *See id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 51,082-83.

96. *Id.*

07-10.⁹⁷ This was the first advisory opinion addressing a hospital's payment to physicians for providing on-call and indigent care services. Based on the specific facts of the arrangement, the OIG determined that it would not impose sanctions on the facility at issue.⁹⁸ Under the facility's arrangement, the physicians were obligated to: participate in call rotation equally within specialties, provide inpatient care to any patient seen in the emergency department while on-call if the patient was admitted to the facility regardless of the patient's ability to pay for the care, respond to calls within a reasonable time and such times would be monitored, collaborate and participate in risk management and performance improvement efforts and committees, and document in the medical records in a timely fashion the services provided for all patients seen.⁹⁹ Physicians were paid a per diem rate for each day spent on-call, except for the requirement that each physician was required to provide one and one-half days of on-call services each month without payment.¹⁰⁰ The per diem rate varied based on the specialty and whether call coverage was on a weekend or weekday.¹⁰¹ The facility engaged an independent health care industry consultant to advise the facility on "the reasonableness of the per diem rates paid under the [a]rrangement."¹⁰²

The OIG emphasized three particular aspects of the arrangement that were influential in its decision to not impose sanctions.¹⁰³ First, the payments to the physicians reflected the fair market value of the services provided, and such evaluation was determined by an independent third party analysis without regard to referrals or other business generated between the parties.¹⁰⁴ The payments were tailored to reflect the actual burden on the physicians, the likelihood of actually having to respond, the likelihood of having to provide uncompensated care, and the likely extent of treatment.¹⁰⁵ Beyond actual time spent, the physicians were obligated to provide care to any patient seen while on-call, and the obligation continued until the patient's discharge (meaning the physicians remain at risk of having to furnish additional services for no additional payment).¹⁰⁶ The physicians were required to provide eighteen days per year of uncompensated on-call services as part of the arrangement.¹⁰⁷ The physicians assumed responsibility for medical recordkeeping and for cooperation with the facility relating to risk management and performance improvement efforts.¹⁰⁸

97. OIG Advisory Opinion No. 07-10 (Sept. 20, 2007), <http://oig.hhs.gov/fraud/docs/advisoryopinions/2007/AdvOpn07-10A.pdf>.

98. *Id.* at 1-2.

99. *Id.* at 2-3.

100. *Id.* at 4.

101. *Id.*

102. *Id.*

103. *See* at 8-10.

104. *Id.* at 8-9.

105. *Id.* at 8.

106. *Id.*

107. *Id.*

108. *Id.*

“The difference in per diem rates among specialties [was] based on the different extent of the uncompensated responsibilities that [would] likely fall on the physicians,” and the payments were “administered uniformly for all [physicians] in a given specialty without regard to [an] individual physician’s referrals” or other business generated between the parties.¹⁰⁹

Second, the facility evaluated the circumstances giving rise to the arrangement and determined that the facility “had a legitimate, unmet need for on-call coverage and uncompensated care physician services.”¹¹⁰ The emergency department was understaffed because of a “lack of capable and willing physicians.”¹¹¹ Because of the on-call physician shortage, the facility was forced to transfer patients to other hospitals for the appropriate care. The OIG indicated that the presence of these factors lowered the risk that the arrangement may lead to federal program and patient abuse.¹¹²

Finally, the arrangement contained many additional safeguards that “minimize[d] the risk of fraud and abuse.”¹¹³ The opportunity to provide on-call services pursuant to the arrangement was “offered . . . to all physicians in relevant specialties.”¹¹⁴ The obligations within the specialties were “divided as equally as possible” to avoid being used selectively to reward the highest referrers.¹¹⁵ Additionally, the participating physicians were required to provide follow-up care to any patient seen in the emergency department while on-call if the patient was admitted, regardless of patient’s ability to pay for care.¹¹⁶ This requirement decreased the chance for physicians to “cherry-pick” only those patients that were likely to be lucrative.¹¹⁷ Furthermore, the requirement that physicians document the on-call services promoted “transparency and accountability.”¹¹⁸

The OIG was careful to tailor its opinion to the specific facts of this arrangement and stated that each on-call coverage arrangement must be evaluated based on the totality of the facts and circumstances surrounding it.¹¹⁹

2. Advisory Opinion 07-05: Sale of Ambulatory Surgery Center Ownership Interests.—On June 12, 2007, the OIG issued an advisory opinion relating to the sale of interests in an ambulatory surgery center by physician owners.¹²⁰ The proposed arrangement involved an ambulatory surgery center (“ASC”) in which

109. *Id.* at 9.

110. *Id.*

111. *Id.*

112. *See id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 10.

120. OIG Advisory Opinion No. 07-05 (June 12, 2007), <http://oig.hhs.gov/fraud/docs/advisoryopinions/opinions/2007/Advopin07-05C.pdf>.

three orthopedic surgeons owned 94%, and two gastroenterologists and two anesthesiologists owned the remaining 6%.¹²¹ “Under the [p]roposed [a]rrangement, the [o]rthopedic [s]urgeons would sell to the [tax-exempt] [h]ospital the number of ownership units necessary for the [h]ospital to own 40[%].”¹²² The amount to be paid by the hospital was certified to be fair market value for the units.¹²³ “The amount paid by the [h]ospital [to the orthopedic surgeons for the units] would exceed the amount originally invested by the [o]rthopedic [s]urgeons for this number of units.”¹²⁴ The hospital acknowledged it would be in a position to influence referrals; however, it agreed to limit its ability to make referrals by agreeing to a number of requirements found to be sufficient in other advisory opinions issued by the OIG.¹²⁵

The OIG, however, found that the proposed arrangement failed to meet all of the criteria under the hospital/physician owned ASC safe harbor.¹²⁶ Specifically, the OIG found that the arrangement would not meet the criterion that the amount paid to an investor in return for the investment must be directly proportional to the amount of the capital investment of that investor.¹²⁷ The OIG noted that while each investor would receive a return on investment proportional to the investor’s ownership share, the return would not be proportional to the capital invested by the original investor.¹²⁸ The OIG found relevant the fact that the hospital would buy its shares from the orthopedic surgeons rather than the ASC itself.¹²⁹

The OIG noted that it could not

conclude that the difference in cost of capital acquisition, which results in financial gain to a subset of the physician investors whose referrals may be particularly valuable, is not related, directly or indirectly, to the value or volume of referrals or other business generated between the parties, including referrals by the selling [o]rthopedic [s]urgeons to the [h]ospital or the ASC.¹³⁰

The OIG found that the arrangement posed “a heightened risk of fraud and abuse” and concluded that the “[a]rrangement could potentially generate prohibited remuneration under the anti-kickback statute.”¹³¹

The opinion focuses on the fact that orthopedic surgeons would realize a gain

121. *Id.* at 2.

122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.* at 3.

126. *Id.* at 5.

127. *Id.*

128. *Id.*

129. *Id.* at 5.

130. *Id.* at 6.

131. *Id.*

on their original investment.¹³² However, as certified by the parties, the fair market value of the interests increased since the orthopedic surgeons' original investment.¹³³ Thus, the advisory opinion leaves unanswered how to reconcile the fair market value requirement with the return on original investment requirement of the hospital/physician owned ASC safe harbor. If not clarified, the opinion could have a significant impact on the potential resale of interests by physician investors.

3. *OIG Compliance Guidance Applies to Medical Device Firms.*—On September 6, 2006, the Advanced Medical Technology Association (“AdvaMed”) sent a letter to the OIG asking for “confirmation that the 1989 Special Fraud Alert on Joint Ventures” as well as other fraud and abuse “guidance on physician investment issued by the OIG apply to medical device and distribution entities,” clarification on “certain factors relevant to analyzing a joint venture under the fraud and abuse law[s],” and a request for publication of additional OIG guidance on physician investment in medical device firms.¹³⁴

On October 6, 2006, the OIG issued a response letter confirming that the OIG's 1989 Special Fraud Alert on Joint Ventures as well as other fraud and abuse guidance applies to medical device and distribution entities.¹³⁵ The OIG stated that it believes “all industry stakeholders involved in joint ventures with physicians, including medical device manufacturing and distribution entities, are well-advised to pay close attention to such guidance. Most of our guidance about joint ventures is not sector specific and applies equally to all physician joint ventures.”¹³⁶ Additionally, the OIG clarified that “the amount of revenues generated directly or indirectly by a physician investor is a relevant factor in analyzing a joint venture under the anti-kickback statute.”¹³⁷ The OIG noted that the “small entity . . . safe harbor . . . includes a condition that limits safe harbor protection to entities that derive no more than 40% of their gross revenues from investors, such as physicians.”¹³⁸ The OIG stated, “the fact that a substantial portion of a venture's gross revenues is derived from participant-driven referrals is a potential indicator of a problematic joint venture.”¹³⁹

II. TAX

In 2006 and 2007, the major tax developments again surrounded tax-exempt hospitals and the provision of community benefits. Various levels of government

132. *See id.* at 5-6.

133. *Id.* at 2.

134. Office of Inspector Gen., Dep't of Health & Human Servs., Response to Request for Guidance Regarding Certain Physician Investments in the Medical Device Industries (Oct. 6, 2005), [http://www.oig.hhs.gov/fraud/docs/alertsandbulletins/GuidanceMedicalDevice%20\(2\).pdf](http://www.oig.hhs.gov/fraud/docs/alertsandbulletins/GuidanceMedicalDevice%20(2).pdf).

135. *Id.*

136. *Id.* at 1.

137. *Id.* at 2.

138. *Id.* (citing 42 C.F.R. § 1001.952(a) (2005)).

139. *Id.* (citing 70 Fed. Reg. 4858, 4865 (Jan. 31, 2005)).

undertook investigations and other efforts to clarify, examine, and quantify the community benefit standard and ensure that hospitals are operating in a manner that justifies granting such organizations tax-exempt status.

A. *Redesigned Form 990*

The most significant healthcare development in the area of tax was the redesign of the Form 990. On June 14, 2007, the Internal Revenue Service (“IRS”) released for public comment a discussion draft of a redesigned Form 990 (“Discussion Draft”).¹⁴⁰ Form 990 is the annual return filed by many public charities and other exempt organizations and reports information about the organization’s operations.¹⁴¹ The IRS’s objectives were to promote transparency to the IRS and the public, accurately portray operational information to ensure effective assessment of noncompliance, and minimize filing burdens.¹⁴² An overarching theme in the Discussion Draft was that the IRS intended to solicit detailed information about an organization’s operations and, specifically, how the organization carries out its operations with a focus on areas involving potential abuse.¹⁴³ Additionally, the IRS sought to provide organizations with more opportunities to explain the organization’s operations and charitable purpose.¹⁴⁴

The Discussion Draft included a ten-page core form that all organizations would be required to fill out and then a series of fifteen schedules to be completed by organizations engaging in particular activities.¹⁴⁵ One of the major changes made to Form 990 is the creation of a summary page that is intended to reflect a “snapshot” of important aspects of an organization’s operations that are addressed in greater detail in the rest of the core form.¹⁴⁶ The summary page includes information regarding the total size of the governing board, the number of “independent” members of the governing board, the amount paid to the highest paid employee, and the total executive compensation paid as a percentage of overall program service expenses.¹⁴⁷ The remainder of the core form requests information regarding composition of the governing board and other governance and financial statement practices, joint venture disclosures, compensation disclosures for disqualified persons and compensation of current and certain former officers, directors, trustees, key employees and the top five highest paid employees, and bond-related disclosures.¹⁴⁸

The series of schedules focus on particular conduct, including fundraising,

140. TAX-EXEMPT & GOV’T ENTITIES DIV., IRS, BACKGROUND PAPER—REDESIGNED DRAFT FORM 990 (2007), http://www.irs.gov/pub/irs-tege/form_990_cover_sheet.pdf.

141. *Id.* at 1.

142. *Id.* at 2.

143. *See generally id.*

144. *See generally id.*

145. *Id.* at 2, 4.

146. *Id.* at 3.

147. *Id.*

148. *Id.* at 3-4.

compensation, hospitals, tax-exempt bonds, and non-cash charitable contributions. Schedule H will be the key schedule for health care organizations and will be the vehicle through which such organizations will explain how they satisfy the community benefit standard for exemption. The Community Benefit Report contained within Schedule H addresses: cost-based data for various community benefits, including charity care (without clarifying whether bad debt is included for this purpose), Medicaid and other government programs (without clarifying whether Medicare shortfalls are included for this purpose), a description of any written charity care policy, a description of how the organization assesses the healthcare needs of its community, information about ER policies and procedures, and how the hospital's operations facilitate exempt purposes. Further, the scope of Schedule H extends beyond the community benefit test and encompasses billing information broken down by categories of healthcare coverage, a description of any written collection policy, including how and when the policy is communicated to patients and how the organization collects patient debts and a description of the patient intake process and the education provided to patients regarding their eligibility for government assistance or charity care.

After the ninety-day comment period, the IRS reviewed the numerous comments provided from tax community regarding the Discussion Draft. The IRS is in the process of making additional revisions in response to the comments received and will release the new Form 990 for organizations to complete for returns filed in 2009 for the 2008 tax year.¹⁴⁹

B. Congressional Budget Office Report—Nonprofit Hospitals and the Provision of Community Benefits

In December 2006, the Congressional Budget Office ("CBO") published a report comparing the provision of community benefits provided by nonprofit and for-profit hospitals.¹⁵⁰ The report was requested by the Chairman of the House Committee on Ways and Means to examine whether nonprofit hospitals provide community benefits sufficient to justify their tax-exempt status.¹⁵¹ The results indicated that, "on average, nonprofit hospitals provided higher levels of uncompensated care than did similar for-profit hospitals[;] . . . however, the provision of uncompensated care varied" significantly among nonprofit hospitals.¹⁵² In addition, "[n]onprofit hospitals were more likely than otherwise

149. In December 2007, the IRS released the final version of the redesigned Form 990. Information about the redesigned Form 990, a copy of the Form 990 and its schedules, and information about transitional relief can be found at <http://www.irs.gov/charities/article/0,,id=176613,00.html>.

150. CONG. BUDGET OFFICE, NONPROFIT HOSPITALS AND THE PROVISION OF COMMUNITY BENEFITS (2006), <http://www.cbo.gov/ftpdocs/76xx/doc7695/12-06-Nonprofit.pdf> [hereinafter CBO REPORT].

151. Donald B. Marron, *Preface to CBO REPORT*, *supra* note 150.

152. CBO REPORT, *supra* note 150, at 9.

similar for-profit hospitals to provide certain special[ty] services,” but the nonprofit hospitals provided care “to fewer Medicaid-covered patients as a share of their total patient population.”¹⁵³ Finally, the results showed that, “[o]n average, nonprofit hospitals . . . operate[d] in areas with higher average incomes, lower poverty rates, and lower rates of uninsurance than [similar] for-profit hospitals.”¹⁵⁴

*C. Healthcare Financial Management Association Released Revised
Accounting Guidelines for Healthcare Providers
Regarding Bad Debt and Charity Care*

Also in December 2006, the Healthcare Financial Management Association (“HFMA”) released the updated Statement No. 15 intended to improve clarity and address congressional and legal questions about the reporting practices of tax-exempt hospitals for charity care and bad debt.¹⁵⁵ Where a hospital provides services to a patient determined to have the financial capacity to pay for the services and the patient later fails to pay the amount, this results in a bad debt.¹⁵⁶ Alternatively, charity care is where a hospital provides services to a patient that has demonstrated an inability to pay for services.¹⁵⁷ The updated statement discusses the determination of patient ability to pay and the amount of services eligible for charity support.¹⁵⁸ While the focus is on tax-exempt hospitals, the guidelines also apply “to all taxable and tax-exempt institutional healthcare providers.”¹⁵⁹

D. IRS Issues Draft Governance Guidelines for Charitable Organizations

On February 7, 2007, the IRS posted on its website an informal discussion draft of recommended guidelines for good governance practices for charitable organizations.¹⁶⁰ The IRS’s position was that governing boards of charitable

153. *Id.*

154. *Id.*

155. HEALTHCARE FIN. MGMT. ASS’N, P&P BOARD STATEMENT 15: VALUATION AND FINANCIAL STATEMENTS PRESENTATION OF CHARITY CARE AND BAD DEBTS BY INSTITUTIONAL HEALTHCARE PROVIDERS 1 (2006), <http://www.hfma.org/NR/rdonlyres/B32E0CB5-9AE5-4127-83A3-02FFDE0054D5/0/400530Statement15.pdf>.

156. *Id.* at 2.

157. *Id.*

158. *See generally id.* at 2-12.

159. *Id.* at 2.

160. The IRS removed this posting from its website in response to changes in other related policies. *See* GOVERNANCE OF CHARITABLE ORGANIZATIONS AND RELATED TOPICS, <http://www.irs.gov/charities/article/0,,id=178221,00.html> (last visited Aug. 2, 2008). A copy of the original post can be found at IRS, IRS ISSUES DISCUSSION DRAFT OF “GOOD GOVERNMENT PRACTICES” FOR 501(C)(3) ORGANIZATIONS 1 (2007), *available at* <http://www.pgdc.com/pgdc/news-story/2007/02/08/irs-issues-draft-good-governance-practices-501-c-3-organizations> [hereinafter IRS ISSUES DISCUSSION DRAFT].

organizations should be made up of individuals who are informed and active in overseeing a charity's operations and finances.¹⁶¹ The guidelines included governance practice recommendations pertaining to an organization's mission statement, code of ethics, due diligence, duty of loyalty, transparency, fundraising policy, financial audits, compensation practices, and document retention policy.¹⁶²

E. IRS Report on Exempt Organizations Executive Compensation Compliance Project

"In 2004, the Internal Revenue Service, through the Exempt Organizations Office of the Tax Exempt and Government Entities Division ('EO'), implemented the Executive Compensation Compliance Initiative (the 'Project')."¹⁶³ The IRS intended to "[i]ncrease awareness of compensation as a compliance issue within the charitable sector[,] establish an IRS enforcement presence in this area," examine the "practices and procedures exempt organizations use to determine compensation of their officers, directors, trustees, key employees, and related persons," and "[a]ssess and enhance tax law reporting and compliance with respect to compensation practices of exempt organizations."¹⁶⁴ Part I of the Project involved sending compliance check letters regarding executive compensation to 1223 exempt organizations (both public charities and private foundations) who were selected based on certain Form 990 responses.¹⁶⁵ Then, based in part on the Part I responses, Part II involved 782 examinations conducted "to determine whether the compensation of disqualified persons was reasonable in accordance with" the Internal Revenue Code ("IRC") requirements.¹⁶⁶

The EO released a report in March 2007 discussing the results of the Project (the "Report").¹⁶⁷ The Phase I compliance checks revealed "significant reporting errors and omissions in [certain] areas, particularly excess benefit transactions and transactions with disqualified persons, as well as potential compliance issues related to loans made to officers."¹⁶⁸ The EO noted that "the findings [were] not based on a statistical sampling," only reflected the organizations selected for the Project, "and are not representative of the entire regulated community."¹⁶⁹ Many of the errors and omissions revealed were corrected when the organizations provided additional clarifying information or filed amended returns; however,

161. IRS ISSUES DISCUSSION DRAFT, *supra* note 160.

162. *Id.* at 2-3.

163. IRS, REPORT ON EXEMPT ORGANIZATIONS EXECUTIVE COMPENSATION 1 (2007), *available at* http://www.irs.gov/pub/irs-tege/exec._comp._final.pdf.

164. *Id.* at 2.

165. *Id.* at 3.

166. *Id.* at 3-4.

167. *Id.* at 1.

168. *Id.* at 5.

169. *Id.*

5% of Phase I organizations were recommended for examination under Phase II.¹⁷⁰ Of the 782 examinations, twenty-five “resulted in proposed or assessed excise taxes aggregating in excess of \$21 million against [forty] disqualified persons or organization managers.”¹⁷¹ The assessments were imposed due to:

[(a)] excessive salary and incentive compensation; [(b)] payments for vacation homes, personal legal fees, or personal automobiles that were not reported as compensation; [(c)] payments for personal meals and gifts to others on behalf of disqualified persons that were not reported as compensation; and [(d)] payments to an officer’s for profit corporation in excess of the value of services provided by the corporation.¹⁷²

The Project results discussed in the Report led the EO to make several statements and recommendations regarding potential abuse in the exempt sector.¹⁷³ The EO indicated that the “Form 990 compensation reporting need[ed] to be revised to facilitate accurate and complete reporting” and the “EO needs to revisit . . . when penalties should be assessed for an incomplete Form 990.”¹⁷⁴ Additionally, the EO determined that it needed to communicate with the public regarding the most common return preparation errors identified during the Project and “educate the public charity sector [regarding] the section 4958 rebuttable presumption and how to satisfy the requirements.”¹⁷⁵ Finally, the EO emphasized that the Project further “illustrate[d] the need for a continued enforcement presence in this area” and that the “EO should continue to review compensation issues.”¹⁷⁶

F. Senator Grassley’s Letter Requesting Examination of How Nonprofit Hospitals Fulfill Community Benefit Requirements

In April 2007, Senator Grassley, ranking member of the Committee on Finance, asked the Government Accountability Office (“GAO”) to study how nonprofit hospitals meet the community benefit requirement in order to qualify for tax-exempt status.¹⁷⁷ Senator Grassley expressed concerns regarding the broad discretion for designation that hospitals have under the community benefit standard and inconsistent reporting caused by the variation among hospital policies relating to charity care and bad debt.¹⁷⁸ In addition, Senator Grassley

170. *Id.*

171. *Id.* at 7.

172. *Id.*

173. *Id.* at 10.

174. *Id.*

175. *Id.*

176. *Id.*

177. Press Release, U.S. Senate Comm. on Fin., Grassley Seeks GAO Study of Non Profit Hospitals’ Community Benefits (Apr. 5, 2007), <http://finance.senate.gov/press/Gpress/2007/prg040507b.pdf>.

178. *Id.*

was concerned about nonprofit hospitals' executive and board member compensation and these individuals' involvement with for-profit business ventures with the nonprofit hospitals.¹⁷⁹

Specifically, Senator Grassley requested that the GAO conduct a study examining the following issues: (1) State and IRS community benefit standards and hospital industry guidelines used to interpret these standards; (2) standards and policies hospitals use pertaining to uncompensated care, charity care, and bad debt and how hospitals interpret and report these categories in practice; (3) standards hospitals use for defining and reporting community benefits other than uncompensated care; and (4) nonprofit hospital executive and board member compensation and these individuals' involvement in for-profit ventures with the nonprofit hospitals.¹⁸⁰

III. REIMBURSEMENT AND PAYMENT ISSUES

A. 2008 Physician Fee Schedule

On July 2, 2007, the Centers for Medicare and Medicaid Services ("CMS") issued Proposed Revisions to Payment Policies under the Physician Fee Schedule for CY2008 ("2008 Proposed Physician Fee Schedule").¹⁸¹ The 2008 Proposed Physician Fee Schedule contains a number of proposed revisions to the Stark regulations as well as solicitation of comments for a number of other potential revisions to the Stark regulations.¹⁸² Among other things, in the 2008 Proposed Physician Fee Schedule, CMS discusses the anti-mark up provisions for purchased tests, the In-Office Ancillary Services exception, independent diagnostic testing facilities ("IDTFs") performance standards, per click payments, and under arrangements relationships.¹⁸³ A brief summary of each of these proposed changes is contained below.

1. *The Anti-Markup Rule.*—Under the Medicare Anti-Markup Rule, if a physician bills Medicare for the technical component of a diagnostic test performed by an outside supplier, the physician is prohibited from marking up the charges for the technical component submitted to Medicare above what the physician paid to purchase the test from the outside supplier.¹⁸⁴ Currently, the Anti-Markup Rule does not apply to the professional component of a diagnostic test.¹⁸⁵

In the 2008 Proposed Physician Fee Schedule, CMS proposed to expand the

179. *Id.*

180. *Id.*

181. Payment and Policies Under the Physician Fee Schedule, 72 Fed. Reg. 38,122 (proposed July 12, 2007) (to be codified at 42 C.F.R. pt. 409, 410, 411, 413, 414, 415, 418, 423, 424, 482, 484, 485, and 491).

182. *Id.* at 38,160.

183. *See id.* at 38,123.

184. *Id.* at 38,179.

185. *Id.*

Anti-Markup Rule to the technical and professional component services whether they are “purchased interpretations” or provided under reassignment of rights, unless the performing supplier is a full-time employee of the billing entity.¹⁸⁶ Thus, the only technical or professional services a medical group can mark-up are those performed by the group’s “full-time employees.”¹⁸⁷ If adopted, this would limit the ability of IDTFs and group practices with in-office imaging equipment to use independent contractor (or part-time employee) radiologists to perform the interpretations since the group practice would be limited to billing Medicare no more than the amount actually paid to the radiologist. Additionally, CMS has proposed to exclude from the “net charge” that can be passed through to Medicare any amount attributable to rent or similar charges paid by the supplier to the billing entity for space or equipment related to the provision of the interpretations.¹⁸⁸

Although outside the survey period, on November 27, 2007, the 2008 Physician Fee Schedule final rule was published.¹⁸⁹ The final rule included the anti-markup changes as noted above. However, on January 3, 2008, CMS announced a one-year delay of the application of the anti-markup rule to certain diagnostic services performed in certain locations.¹⁹⁰

2. In-Office Ancillary Services Exception.—The in-office ancillary services exception permits a physician to order designated health services for his or her Medicare and Medicaid patients and then have the physician’s practice perform and bill for the services without violating the Stark law if the physician is able to meet certain supervision, billing, and building requirements.¹⁹¹

In the 2008 Proposed Physician Fee Schedule, CMS did not issue any specific revisions to the in-office ancillary exception, but instead requested comments on whether changes to the in-office ancillary exception are necessary and, if so, what changes should be made.¹⁹² CMS specifically requested comments on: (1) whether certain services should not be protected under the exception (for example, any therapy services that are not provided on an incident to basis and service that will not be used at the time of the patient’s visit in order to assist the physician with making a diagnosis or plan of treatment during the visit); (2) whether, and, if so, how CMS should change the definition of “same

186. *Id.* at 38,180.

187. *Id.*

188. *Id.*

189. Revisions to Payment Policies Under the Physician Fee Schedule, 72 Fed. Reg. 66,222 (Nov. 27, 2007) (to be codified at scattered sections of 42 C.F.R.).

190. Delay of the Date of Applicability of the Revised Anti-Makeup Provisions for Certain Services Furnished in Certain Locations, 73 Fed. Reg. 404 (Jan. 3, 2008) (to be codified at 42 C.F.R. pt. 414).

191. *See* 42 C.F.R. § 411.355(b) (2007); *see also* Revisions to Payment Policies Under the Physician Fee Schedule, 72 Fed. Reg. 66,222 (Nov. 27, 2007) (to be codified at scattered sections of 42 C.F.R.).

192. Revisions to Payment Policies Under the Physician Fee Schedule, 72 Fed. Reg. 66,222 (Nov. 27, 2007) (to be codified at scattered sections of 42 C.F.R.).

building” and “centralized building”; (3) whether non-specialist physicians should be able to use the exception to refer patients for specialized services that will be performed on equipment owned by non-specialist physicians; and (4) suggestions on any other restrictions on ownership or investment in services that would curtail program abuse.¹⁹³

3. *IDTF Performance Standards*.—In the 2007 Physician Fee Schedule, CMS expanded the conditions of participation for IDTFs to require that at the time of enrollment or re-enrollment, the IDTF must certify that it meets fourteen additional performance standards.¹⁹⁴ In January, CMS issued Transmittal 187 which updated the Program Manual and some of the performance standards.¹⁹⁵ After much controversy, CMS rescinded the transmittal.¹⁹⁶ However, now CMS is proposing, in the 2008 Proposed Physician Fee Schedule, to revise several of the performance standards and add new performance standards.¹⁹⁷

The most significant change in the IDTF performance standard is that CMS is proposing to add a new performance standard requiring the IDTF to certify that it “[d]oes not share space, equipment, or staff or sublease its operations to another individual or organization.”¹⁹⁸ CMS has stated that the purpose of this standard is to ensure that the operations of an IDTF are separate and distinct from the operations of other entities.¹⁹⁹ CMS has also stated that shared facility arrangements raise concerns under Stark and Anti-Kickback. If adopted, this standard would eliminate the ability of an IDTF to enter into a sublease arrangement with a physician practice, hospital, or other entity.

4. *“Per Click” Payments*.—Section 1877(e)(1) of the Act provides an exception to the prohibition of physician referrals for space and equipment leases provided certain requirements are met.²⁰⁰ The requirements, contained at sections 411.357(a) and (b), are that the lease be “commercially reasonable even if no referrals were made between the parties” and that the rental charges be “set in advance, [be] consistent with fair market value, and . . . not be determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.”²⁰¹

193. *See id.* at 66,306. CMS noted that because it did not make a specific proposal with regard to the in-office ancillary exception, but merely solicited comments, any revisions to the exception would be accomplished through future rulemaking with provisions for public comment.

194. *Id.* at 38,169.

195. CTRS. FOR MEDICARE & MEDICAID SERVS., DEP’T HEALTH & HUMAN SERVS., THE CMS QUARTERLY PROVIDER UPDATE (Jan. 2007), <http://www.cms.hhs.gov/quarterlyproviderupdates/downloads/January07whatsnew.pdf>.

196. *See, e.g.*, CTRS. FOR MEDICARE & MEDICAID SERVS., DEP’T HEALTH & HUMAN SERVS., CMS RESCINDS TRANSMITTAL 187 ON INDEPENDENT DIAGNOSTIC TESTING FACILITY (2007), http://www.medicareupdate.typepad.com/medicare_update/2007/02/cms_rescinds_tr.htm.

197. Revisions to Payment Policies Under the Physician Fee Schedule, 72 Fed. Reg. at 66,285.

198. *Id.* at 66,290.

199. *See id.* at 66,290-93.

200. 42 C.F.R. § 411.357(a)-(b) (2007).

201. *Id.*

In the 2001 Stark Phase I final rule, CMS stated:

[W]e are permitting time-based or unit-of-service-based payments, even when the physician receiving the payment has generated the payment through a DHS referral. We have reviewed the legislative history with respect to the exception for space and equipment leases and concluded that the Congress intended that the time-based or unit-of-service-based payments be protected, so long as the payment per unit is at fair market value at inception and does not subsequently change during the lease term in any manner that takes into account DHS referrals.²⁰²

In a reversal of this statement in the 2001 Stark Phase I final rule where CMS opened the door to use unit of service or “per click” payments, in the 2008 Proposed Physician Fee Schedule, CMS proposed that “space and equipment leases may not include unit-of-service-based payments to a physician lessor [(or entity in which the physician is an investor)] for services rendered by an entity lessee to patients who are referred by a physician lessor . . . to the entity.”²⁰³ CMS noted its concern that such payments are potentially abusive when the physician-lessor is paid every time he/she makes a referral to that location for use of the equipment.²⁰⁴ CMS believes that in such a situation, the physician has an incentive to profit from referring a high volume of patients to the lessee.²⁰⁵

If finalized, this prohibition would adversely affect most equipment leasing arrangements paid on a “per click” basis where the lessor is a physician or an entity that has physician ownership. This prohibition would also affect equipment leasing companies with physician ownership and management companies that manage physician-owned companies that provide equipment on a per-use basis. In addition to prohibiting the use of per click payments to physician-owned leasing entities, CMS is soliciting comments on whether it should also prohibit per click payments by a physician to an entity from which the physician leases space or equipment if that entity refers patients to the leasing physician.²⁰⁶

5. *Services Furnished “Under Arrangements.”*—The Stark regulations

202. Phase I, *supra* note 12, at 876.

203. Revisions to Payment Policies Under the Physician Fee Schedule, 72 Fed. Reg. 38,183. Although the extent Stark exceptions for space and equipment leases currently permit “per click” lease payments, “per click” lease payments do not satisfy the requirements of the corresponding space and equipment rental safe harbors under the federal anti-kickback statute. *Id.*

204. *Id.*

205. *Id.*

206. See Revisions to Payment Policies Under the Physician Fee Schedule, 72 Fed. Reg. 66,222, 66,306 (Nov. 27, 2007) (to be codified at scattered sections of 42 C.F.R. pt. 409). CMS noted that it would not finalize any of the proposed changes regarding per click payments in the final rule due to the number of comments received and the significance of the proposed changes. *Id.* However, CMS noted that it had sufficient comments to finalize the revisions at a later date with no new notice and comment period and intends to finalize a rule at a later date regarding “per click” payments. *Id.*

prohibit a physician from making referrals for DHS to an entity with which the physician has a financial relationship and prohibits the entity from billing Medicare for such DHS unless an exception applies.²⁰⁷ In an “under arrangements” relationship an outside supplier (usually a physician/hospital joint venture) furnishes the services and the hospital bills for the services, thus the outside supplier is not an “entity” for purposes of the Stark Law. This is because the Stark regulations narrowly defines “entity” to mean the entity that submits a claim to the Medicare program.²⁰⁸ In an “under arrangements” relationship, the only entity submitting a claim to Medicare is the hospital.

CMS has expressed concern with these types of “under arrangements” relationship with physician-owned entities for a number of reasons including that these arrangements (1) encourage overutilization of services; (2) have no legitimate purpose other than to allow referring physicians to make money on referrals; (3) involve services previously provided in the hospital and which could continue to be provided by the hospital; and (4) the services are now furnished in less medically intensive setting than a hospital and billed at the higher HOPPS rates.²⁰⁹

Likely due, at least in part, to the recent Medicare payment reductions for imaging services performed in non-hospital settings and surgical services performed in ambulatory surgery centers, “under arrangements” relationships have been proliferating. In an attempt to prohibit these types of relationships, CMS, in the 2008 Proposed Physician Fee Schedule proposed to expand the definition of entity to include the person or entity that performs the Stark DHS, as well as the person or entity that submits claims or causes claims to be submitted to Medicare for the DHS.²¹⁰ The proposed revision to the definition of “entity” would essentially bar referring physicians from participating in joint ventures that provide services under arrangements to hospitals or others. In the 2008 Proposed Physician Fee Schedule, CMS also solicited comments on a MedPac proposal to prohibit entities in which there is physician investment and that derive a “substantial portion of their revenue” from a DHS entity from providing equipment or services to imaging centers and other providers of DHS.²¹¹ If implemented, physician-owned entities may be prohibited from providing equipment or services to any entity that furnishes DHS.²¹²

207. *Id.* at 38,186.

208. *Id.* at 38,224.

209. *Id.* at 38,186.

210. *Id.* at 38,187.

211. *Id.*

212. CMS noted that it would not finalize any of the proposed changes regarding “under arrangements” relationships in the final rule due to the number of comments received and the significance of the proposed changes. *Id.* However, CMS noted that it had sufficient comments to finalize the revisions at a later date with no new notice and comment period and intends to finalize a rule at a later date regarding “under arrangements” relationships. *Id.*

B. Proposed Changes to LTCH Payments

CMS has long been concerned with the close referral relationships between acute care hospitals and long term acute care hospitals ("LTCHs").²¹³ LTCHs are defined as hospitals that have an average Medicare inpatient length of stay greater than twenty-five days.²¹⁴ The concern regarding these referrals prompted the creation of a special payment provision, often called the 25% rule, which allowed co-located hospitals, hospitals within hospitals, and satellite LTCHs to admit up to 25% of their patients from the host hospital and receive payment under the LTCH prospective payment system.²¹⁵ If the limit was violated, the payment for all cases from the host hospital are adjusted to the lower of the amount payable under the LTCH prospective payment system or the equivalent of what Medicare would pay under the inpatient prospective payment system.²¹⁶ CMS is proposing changes to the 25% rule. CMS now proposes to extend the payment adjustment to almost all LTCHs for which more than 25% of discharged patients were admitted from a particular hospital regardless of whether it is co-located.²¹⁷

IV. QUALITY

Section 101 of the Tax Relief and Health Care Act of 2006 ("TRHCA") required the Secretary to implement a system for the reporting by eligible professionals of data on certain quality measures.²¹⁸ Under this mandate, CMS created the Physician Quality Reporting Initiative ("PQRI") which establishes a financial incentive for eligible professionals (defined as physicians, practitioners, and therapists) to participate in a voluntary quality-reporting program.²¹⁹ Eligible professionals who choose to participate and successfully report on a designated set of quality measures for services paid under the Medicare Physician Fee Schedule and provided between July 1 and December 31, 2007, may earn a bonus payment of 1.5% of their charges during that period, subject to a cap.²²⁰

The statutory description of satisfactory reporting depends on how many quality measures are applicable to the services furnished by the eligible professional during the entire period of July 1, 2007 to December 31, 2007.²²¹ If there are no more than three quality measures applicable to the services provided by the eligible professional, then each measure must be reported for at

213. Prospective Payment System for Long-Term Care Hospitals, 72 Fed. Reg. 4776, 4813 (Feb. 1, 2007) (to be codified at 42 C.F.R. pts. 412 & 413).

214. *See id.*

215. *See id.*

216. *See id.*

217. *Id.*

218. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 101, 120 Stat. 2922, 2975-81.

219. *Id.*

220. *Id.* at 2977-78.

221. *Id.* at 2978.

least 80% of the cases in which the measure was reportable.²²² If there are four or more quality measures applicable to the services provided by the eligible professional, then at least three measures, selected by the eligible professional, must be reported for at least 80% of the cases in which measure was reportable.²²³

Eligible professionals select the quality measures that are applicable to their practices. If an eligible professional submits data for a quality measure, then that measure is presumed to be applicable for the purposes of determining satisfactory reporting.²²⁴ CMS recommends that eligible professionals report on every quality measure that is applicable to their patient populations to: (1) increase the likelihood that they will reach the 80% satisfactory reporting requirement for the requisite number of measures; and (2) increase the likelihood that they will not be affected by the bonus payment cap.²²⁵

Participating eligible professionals who successfully report as prescribed by TRHCA Section 101 may earn a 1.5% bonus, subject to a cap.²²⁶ The bonus will apply to allowed charges for all covered professional services, not just those charges associated with reported quality measures.²²⁷ The term “allowed charges” refers to total charges, including the beneficiary deductible and copayment, not just the 80% paid by Medicare or the portion covered by Medicare where Medicare is the secondary payor.²²⁸

A payment cap that would reduce the potential bonus below 1.5% of allowed charges may apply in situations where an eligible professional reports relatively few instances of quality measure data.²²⁹ Eligible professional’s caps are calculated by multiplying: (1) their total instances of reporting quality data for all measures (not limited only to measures meeting the 80% threshold), by (2) a constant of 300%, and by (3) the national average per measure payment amount.²³⁰ The national average per measure payment is one value for all measures and all participants that is calculated by dividing: (1) the total amount of allowed charges under the Physician Fee Schedule for all covered professional services furnished during the reporting period on claims for which quality measures were reported by all participants in the program by (2) the total number of instances for which data were reported by all participants in the program for all measures during the reporting period.²³¹

222. *Id.*

223. *Id.*

224. *Id.* at 2979.

225. Proposed Revisions to Payment Policies Under the Physician Fee Schedule, 72 Fed. Reg. 38,210.

226. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 101, 120 Stat. 2922, 2977-78 (to be codified at 42 U.S.C. § 1395).

227. *Id.* at 2978.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

CMS will do sampling to test the reporting.²³² CMS plans to focus on situations where eligible professionals have successfully reported fewer than three quality measures.²³³ If CMS finds that eligible professionals who have reported fewer than three quality measures have not reported additional measures that are also applicable to the services they furnished during the reporting period, then CMS cannot pay those eligible professionals the bonus incentive payment.²³⁴

V. PEER REVIEW AND CREDENTIALING: JCAHO STANDARD MS. 1.20

The Joint Commission on Accreditation of Healthcare Organizations (“JCAHO”) revised its Hospital Accreditation Standards 2007 (“Revised Standards”) to include three new concepts.²³⁵ First, organizations must now incorporate into their bylaws six new areas of general competency in order to comply with MS. 1.20. The six new areas in which practitioners are expected to be competent are: (1) patient care that is compassionate, appropriate, and effective for the promotion of health, prevention of illness, treatment of disease, and care at the end of life, (2) knowledge of established and evolving biomedical, clinical and social sciences, and the application of that knowledge to patient care and education of others; (3) use of scientific evidence and methods to investigate, evaluate, and improve patient care practices; (4) interpersonal and communication skills that enable them to establish and maintain professional relationships with patients, families and other members of health care teams; (5) behaviors that reflect a commitment to continuous professional development, ethical practice, and understanding and sensitivity to diversity, and a responsible attitude toward their patients, their profession and society; and (6) an understanding of both the context and systems in which health care is provided and the ability to apply this knowledge to improve and optimize health care.²³⁶ The additional two concepts established by the revised standards require the medical staff to focus practitioner evaluations on the individual’s professional performance and to evaluate practitioners on an ongoing basis, rather than waiting for reappointment to the medical staff.

Additionally, JCAHO made significant revisions to Standard MS. 1.20 pertaining to medical staff bylaws, regulations, and policies.²³⁷ The revisions were intended to support and reinforce the relationship between the medical staff and the governing body.²³⁸ The revised MS. 1.20 contains thirty-three discrete items that must be incorporated in an accredited hospital’s medical staff

232. *Id.* at 2979.

233. *Id.* at 2978.

234. *Id.*

235. See generally KATHY L. POPPITT, CREDENTIALS AND PEER REVIEW CHALLENGES AND STRATEGIES (2008).

236. *Id.*

237. The revisions to MS. 1.20 are effective July 1, 2009. The text of MS. 1.20 can be found at <http://www.jcrinc.com/fpdf/pubs/pdfs/JCReqs/JCP-09-07-S3.pdf>.

238. *Id.*

bylaws.²³⁹ The revised MS. 1.20 “addresses situations in which a medical staff believes that its medical staff executive committee is not [adequately] representing its views . . . [regarding] patient safety and quality of care.”²⁴⁰ “[T]he medical staff bylaws must [now] indicate what authority the medical staff has delegated to the medical staff executive committee, and how [such] authority [can be] delegated and removed.”²⁴¹ The revisions state “that the medical staff has the ability to adopt medical staff bylaws, rules and regulations, and policies and to propose them directly to the governing body, even if the subject matter had been delegated to the medical staff executive committee.”²⁴²

It is important to note that since the JCAHO adopted the revisions to MS. 1.20, there has been significant criticism of the new standards leading to the appointment of a JCAHO task force that will undertake an investigation of the revisions.²⁴³

VI. CHANGES TO THE HOSPITAL CONDITIONS OF PARTICIPATION, INFORMED CONSENT GUIDELINES, AND HOSPITAL DISCHARGE REQUIREMENTS

A. *Hospital Conditions of Participation*

On November 27, 2006, CMS issued a final rule revising certain requirements of the hospital conditions of participation (“CoPs”).²⁴⁴ The revisions made changes to the hospital CoPs for completion of history and physical examination, authentication of verbal orders, securing medication, and completion of postanesthesia evaluations.²⁴⁵

First, the changes regarding the completion of the history and physical examination are contained in the medical staff CoP located at 42 C.F.R. § 482.22(c)(5). The revised requirement expands the timeframe for completion of the history and physical examination to “no more than [thirty] days before or [twenty-four] hours after admission,” and documentation must be placed in the patient’s medical record within twenty-four hours of admission.²⁴⁶ When a history and physical examination is recorded within thirty days before admission, the hospital must ensure that an updated medical record entry documenting an examination for any changes in the patient’s condition is completed and

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. The task force must report its findings at the end of February 2008. News Release, Joint Comm’n, Joint Commission Announces Task Force on Implementation of MS. 1.20 (Jan. 3, 2008), http://www.jointcommission.org/NewsRoom/NewsReleases/nr_1_3_08.htm.

244. Hospital Conditions of Participation: Requirements for History and Physical Examinations: Authentication of Verbal Orders; Securing Medications; and Postanesthesia Evaluations, 71 Fed. Reg. 68,672 (Nov. 27, 2006) (codified at 42 C.F.R. pt. 482).

245. *Id.* at 68,672.

246. 42 C.F.R. § 482.22(c)(5) (2008).

documented in the patient's medical record within twenty-four hours after admission.²⁴⁷ Additionally, the requirement no longer requires that practitioners must be granted the privilege to conduct a medical history and physical examination by the medical staff, rather the individual completing the medical history and physical examination must be qualified to do so "in accordance with [s]tate law and hospital policy."²⁴⁸

Second, the changes regarding the authentication of verbal orders are contained in the nursing services CoP²⁴⁹ and the medical record services CoP.²⁵⁰ The changes emphasize that hospitals must continue to prohibit the routine use of verbal orders and that verbal orders only be accepted when authorized "by hospital policy and procedures consistent with [f]ederal and [s]tate law."²⁵¹ Additionally, the time must now be noted in all patient medical record entries in addition to the requirements that the entry be legible, complete, dated, and authenticated by the person for providing or evaluation the service provided.²⁵² A temporary exception to the requirement that all orders, including verbal orders, be dated, timed, and authenticated by the ordering practitioner is permitted.²⁵³ For a period of five years from the effective date of the final rule, verbal orders will not need to be signed by the ordering practitioner, but could be authenticated by another practitioner responsible for the care of the patient.²⁵⁴ Additionally, "[a]ll verbal orders must be authenticated based [on] [f]ederal and [s]tate law. If there is no [s]tate law that designates a specific timeframe . . . , [then] verbal orders must be authenticated within [forty-eight] hours."²⁵⁵

Third, the changes regarding the securing of medication are contained in the pharmaceutical services CoP.²⁵⁶ "All drugs . . . must be kept in . . . secure area[s] and locked when appropriate."²⁵⁷ This change provides hospitals with greater flexibility in the storage of drugs and biologicals as the previous CoP required that all drugs and biologicals be kept in a locked storage area. However, all scheduled drugs (II, III, IV, and V) "must be . . . locked within a secure area," and "[o]nly authorized personnel may have access to locked areas."²⁵⁸

Finally, the changes regarding the completion of post-anesthesia evaluations are contained in the anesthesia services CoP.²⁵⁹ The revision provides that a post-anesthesia evaluation for inpatients may be completed and documented by

247. *Id.*

248. *Id.*

249. *Id.* § 482.23(c)(2)(i)-(ii).

250. *Id.* § 482.24(c)(1)(i).

251. *Id.* § 482.23(c)(2)(i)-(ii).

252. *Id.* § 482.24(c)(1).

253. *Id.* § 482.24(c)(1)(ii).

254. *Id.*

255. *Id.* § 482.24(c)(1)(iii).

256. *Id.* § 482.25(b)(2).

257. *Id.* § 482.25(b)(2)(i).

258. 42 C.F.R. § 482.25(b)(2)(ii)-(iii) (2007).

259. 42 C.F.R. § 482.52(b)(3) (2008).

any individual qualified to administer anesthesia instead of only by the individual that administered the anesthesia.²⁶⁰

B. Hospital Informed Consent Guidelines

The requirements related to informed consent for hospitals are found in the Patient's Rights CoP,²⁶¹ the medical records CoP,²⁶² and the surgical services CoP.²⁶³ On April 13, 2007, CMS issued new interpretative guidelines on informed consent in a letter to state survey agency directors.²⁶⁴ The interpretative guidelines discuss the applicable requirements for each CoP relating to informed decision-making and informed consent and the survey procedure to be used to determine compliance for that CoP.²⁶⁵

Specifically, the interpretative guidelines modify or supplement the following areas. "Tag A-0049 . . . in the Patients' Rights CoP discusses the patient's or patient's representative's right to make informed decisions regarding the patient's care."²⁶⁶ "Tag A-0238 . . . in the medical records CoP discusses the requirement that the hospital must ensure that patient medical records contain properly executed informed consent forms for procedures or treatments specified by the hospital [m]edical [s]taff, or by [f]ederal or [s]tate law if applicable, to require written patient consent."²⁶⁷ "Tag A-0392 . . . in the [s]urgical [s]ervices CoP discusses the requirement that the hospital must ensure that a properly executed informed consent form is in the patient's medical record before surgery, except in emergencies."²⁶⁸

C. Hospital Discharge Requirements

On November 27, 2006, CMS issued a final rule providing new requirements for hospital discharge notices under Medicare and the Medicare Advantage ("MA") program.²⁶⁹ The final rule contains requirements on how hospitals must notify Medicare beneficiaries who are inpatients about their discharge rights.²⁷⁰ Notice regarding hospital discharge "is required . . . for . . . Medicare

260. *Id.*

261. 42 C.F.R. § 482.13(b)(2) (2007).

262. 42 C.F.R. § 482.24(c)(2)(v) (2008).

263. *Id.* § 482.51(b)(2).

264. Memorandum from the Survey & Certification Group of the Ctr. for Medicaid and State Operations to State Survey Agency Dirs., Revisions to the Hospital Interpretive Guidelines for Informed Consent (Apr. 13, 2007), <http://www.cms.hhs.gov/SurveyCertificationGenInfo/downloads/scletter07-17.pdf>.

265. *See generally id.*

266. *Id.* at 1.

267. *Id.*

268. *Id.*

269. Medicare Program; Notification of Hospital Discharge Appeal Rights, 71 Fed. Reg. 68,708 (Nov. 27, 2006) (codified at 42 C.F.R. pts. 405, 422 & 489).

270. *Id.*

beneficiaries and for beneficiaries enrolled in . . . MA plans and other Medicare health plans subject to MA regulations.”²⁷¹

Hospitals are required to use “a revised version of the Important Message from Medicare (‘IM’) . . . to explain the discharge rights.”²⁷² The IM will include “a statement of patients’ rights, information about when a beneficiary will and will not be liable for charges for continued stay . . . , [and] a more detailed description of . . . appeal rights.”²⁷³

Hospitals must issue the IM within [two] days of admission, and must obtain the signature of the [Medicare] beneficiary or his or her representative. Hospitals [must] also deliver a copy of the signed notice prior to discharge, but not more than [two] days before the discharge. For beneficiaries [that] request an appeal, the hospital [must] deliver a more detailed notice.²⁷⁴

VII. ANTITRUST

In a unanimous ruling, the Federal Trade Commission (“FTC”) found that Evanston Northwestern Healthcare Corp. (“ENH”) substantially lessened competition in violation of section 7 of the Clayton Act when it acquired Highland Park Hospital (“HPH”) resulting in higher prices for insurers and consumers for general acute care inpatient services, but declined to order divestiture of the acquired hospital.²⁷⁵ The FTC instead ordered ENH to create two independent negotiating teams, one for ENH and one for HPH, to negotiate separately and independently with purchasers of inpatient hospital services.²⁷⁶ The FTC did state in its opinion that

[d]ivestiture is the preferred remedy for challenges to unlawful mergers, regardless of whether the challenge occurs before or after consummation. Thus, where it is relatively clear that the unwinding of a hospital merger would be unlikely to involve substantial costs, all else being equal, the Commission likely would select divestiture as the remedy.²⁷⁷

VIII. DMEPOS COMPETITIVE BIDDING PROGRAM

On April 2, 2007, CMS issued a final rule establishing a competitive bidding process to set Medicare payment amounts for certain items of durable medical

271. *Id.*

272. *Id.*

273. *Id.* at 68,710-11.

274. *Id.* at 68,708.

275. *See In re Evanston Northwestern Healthcare Corp.*, FTC No. 9315, 2007 WL 2286195 (Aug. 6, 2007).

276. *Id.*

277. *Id.*

equipment, prosthetics, orthotics, and supplies (“DMEPOS”).²⁷⁸ The final rule requires suppliers to be successful bidders and meet program standards to be selected to supply DMEPOS items to Medicare beneficiaries in ten competitive bidding areas (“CBAs”).²⁷⁹ With few exceptions, suppliers that do not bid or are unsuccessful in their bids will not be able to bill Medicare for items in the CBAs.²⁸⁰

CMS will phase in competitive bidding by DMEPOs product category.²⁸¹ For 2007, the items include: (1) oxygen supplies and equipment; (2) standard power wheelchairs, scooters, and related accessories; (3) complex rehabilitative power wheelchairs and related accessories; (4) mail order diabetic supplies; (5) enteral nutrients, equipment, and supplies; (6) continuous positive airway pressure devices, respiratory assist devices, and related supplies and accessories; (7) hospital beds and related supplies; (8) negative pressure wound therapy pumps and related supplies and accessories; (9) walkers and related accessories; and (10) support surfaces (group two mattresses and overlays) in Miami and San Juan only.²⁸²

Competitive bidding will impact Medicare DMEPOs pricing. The bids will be used to set a single payment amount for each item in the particular CBA.²⁸³ Payment under the competitive bidding process was mandated by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (“MMA”)²⁸⁴ and will be effective April 1, 2008. CMS expects that the competitive bidding process will save the Medicare program \$1 billion annually once fully implemented.²⁸⁵

IX. FOOD AND DRUG LAW

The Institute of Medicine (“IOM”) of the National Academies issued a report, *The Future of Drug Safety: Action Steps for Congress*, which includes recommendations for strengthening the FDA’s post-market drug surveillance capabilities.²⁸⁶ Among the recommendations are expanding the agency’s regulatory authority, additional labeling requirements for new drugs, and restrictions on direct-to-consumer advertising.²⁸⁷ In response to the IOM report,

278. Medicare Program; Competitive Acquisition, 72 Fed. Reg. 17,992 (Apr. 10, 2007) (to be codified at 42 C.F.R. pts. 411 & 414).

279. *See id.* at 18,010.

280. *Id.* at 18,006-08.

281. *Id.* at 17,992.

282. *Id.* at 18,021.

283. *Id.* at 17,998.

284. *Id.* at 18,070.

285. *See id.* at 18,080.

286. INST. OF MED., REPORT BRIEF—THE FUTURE OF DRUG SAFETY: ACTION STEPS FOR CONGRESS (2006), http://www.iom.edu/Object.File/Master/37/331/11750_report_brief_Congress.pdf.

287. *Id.*

the FDA issued additional plans for post-market drug monitoring, including a pilot program to profile the safety of newly approved drugs.²⁸⁸

On December 14, 2006, the FDA issued two proposed rules which would significantly impact the area of food and drug law regarding investigational drugs. The first proposed rule deals with expanded access for investigational drugs for treatment use.²⁸⁹ Under the proposed rule, "expanded access to investigational drugs . . . would be available to individual patients, including in emergencies; intermediate-size patient populations; and larger populations under a treatment protocol or treatment investigational new drug application."²⁹⁰ The intent of the proposed rule is "to improve access to investigational drugs for patients with serious or immediately life-threatening diseases or conditions, who lack other" treatment options.²⁹¹ The second proposed rule deals with charging for investigational drugs.²⁹² In the proposed rule, the "FDA is proposing to revise the . . . charging regulation to clarify the circumstances in which charging for an investigational drug in a clinical trial is appropriate, to set forth criteria for charging for an investigational drug for the different types of expanded access" to the investigational drugs in the first proposed rule discussed above, "and to clarify what costs can be recovered for an investigational drug."²⁹³

On May 9, 2007, the Senate passed the Food and Drug Administration Revitalization Act reauthorizing the user fee programs and adding sections to reform the FDA's post-market drug surveillance function.²⁹⁴ The bill requires the Secretary to assess and collect fees for review of direct-to-consumer television advertisements for prescription drugs.²⁹⁵ The bill also increases the civil monetary penalties for companies that fail to comply with FDA directives.²⁹⁶

288. FDA, THE FUTURE OF DRUG SAFETY—PROMOTING AND PROTECTING THE HEALTH OF THE PUBLIC: FDA'S RESPONSE TO THE INSTITUTE OF MEDICINE'S 2006 REPORT (2007).

289. Expanded Access to Investigational Drugs for Treatment Use, 71 Fed. Reg. 75,147 (Dec. 14, 2006) (to be codified at 21 C.F.R. pt. 312).

290. *Id.* at 75,147.

291. *Id.*

292. Charging for Investigational Drugs, 71 Fed. Reg. 75,168 (Dec. 14, 2006) (to be codified at 21 C.F.R. pt. 312).

293. *Id.*

294. Food and Drug Administration Revitalization Act, S. 1082, 110th Cong. (2007).

295. *Id.*

296. *Id.*

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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During this survey period,¹ the Indiana appellate courts addressed a number of cases in the fields of automobile, commercial, homeowners, life, and health insurance. There was a particular focus on uninsured/underinsured motorist coverage, with nearly half of the reported cases addressing it. This Article analyzes the most significant decisions in the past year and discusses their impact upon the practice of insurance law.²

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1. The survey period for this Article is approximately November 1, 2006, to October 31, 2007.

2. For cases not discussed in this Article for the survey period, see *Lummis v. State Farm Fire & Casualty Co.*, 469 F.3d 1098, 1100 (7th Cir. 2006) (holding insurer's refusal to pay claim for fire damages was not irrational where insurer reasonably suspected arson); *Reginald Martin Agency, Inc. v. Conseco Medical Insurance Co.*, 478 F. Supp. 2d 1076, 1088-89 (S.D. Ind. 2007) (finding that genuine issues of fact existed with respect to whether agent/broker was insurer's agent); *Nationwide Insurance Co. v. Heck*, 873 N.E.2d 190, 196-97 (Ind. Ct. App. 2007) (finding that summary judgment in favor of insured was appropriate where court found an enforceable written agreement to provide coverage even though there was no signed agreement); *Steve Silveus Insurance, Inc. v. Goshert*, 873 N.E.2d 165, 181 (Ind. Ct. App. 2007) (holding that substantial evidence existed for judgment that agents misappropriated trade secrets); *State Farm Mutual Automobile Insurance Co. v. Cox*, 873 N.E.2d 124, 129 (Ind. Ct. App. 2007) (holding that underinsured motorist insurer was not entitled to subrogation where insured was not "fully compensated" for his bodily injury and property damage); *Cinergy Corp. v. St. Paul Surplus Lines Insurance Co.*, 873 N.E.2d 105, 115 (Ind. Ct. App. 2007) (finding that excess liability insurers did not owe coverage for underlying claims against insured for alleged violation of Federal Clean Air Act), *trans. denied*, 2008 Ind. LEXIS 112 (Ind. Jan. 24, 2008); *Evan v. Poe & Associates, Inc.*, 873 N.E.2d 92, 101 (Ind. Ct. App. 2007) (holding that insureds who were denied benefits under homeowners policy because the application had been filled out improperly by insurance agent could not maintain an action against insurance agency because insured executed a release agreement which unambiguously released agency from liability); *Kempf v. St. Paul Reinsurance Co.*, 872 N.E.2d 162, 167 (Ind. Ct. App. 2007) (holding that vendor, who was selling commercial property under installment contract, was entitled to full value of the property after the property was destroyed by fire regardless of payments received by vendor from purchaser); *Newnam Manufacturing, Inc. v. Transcontinental Insurance Co.*, 871 N.E.2d 396, 402-03 (Ind. Ct. App.) (finding that Indiana Department of Environmental Management's order seeking to have insured install emission control equipment was not a covered loss under commercial general liability policy), *trans. denied*, *Great Northern Insurance v. Newnam Manufacturing, Inc.*, 878 N.E.2d 221 (Ind. 2007); *Liberty Mutual Fire Insurance Co. v. Beatty*, 870 N.E.2d 546, 551 (Ind. Ct. App. 2007) (holding that insured's purported rejection of uninsured motorist coverage was ineffective); *Hornberger v. Farm Bureau*

I. AUTOMOBILE CASES

A. “Other Insurance” Clauses Were Reconcilable and Not Mutually Repugnant

On many occasions, an insured involved in a motor vehicle accident possesses more than one applicable insurance coverage. When that occurs, each insurance policy’s “other insurance” clause must be compared to determine the

Insurance, 868 N.E.2d 1149, 1154 (Ind. Ct. App. 2007) (finding that underinsured motorist insurer was entitled to subrogation rights against alleged tortfeasor); *Safe Auto Insurance Co. v. Farm Bureau Insurance Co.*, 867 N.E.2d 221, 225 (Ind. Ct. App.) (finding that insured’s failure to notify insurer of move to different state or new marriage were material misrepresentations toward policy), *trans. denied*, 878 N.E.2d 210 (Ind. 2007); *Cinergy Corp. v. Associated Electric & Gas Insurance Services, Ltd.*, 865 N.E.2d 571, 583 (Ind. 2007) (finding that insureds’ costs to install equipment intended to reduce harmful emissions were not caused by an occurrence); *Arnett v. Cincinnati Insurance Co.*, 864 N.E.2d 366, 370 (Ind. Ct. App.) (holding that uninsured motorist coverage will not be read into insurance policy), *trans. denied*, 878 N.E.2d 205 (Ind. 2007); *Wells v. Auto Owners Insurance Co.*, 864 N.E.2d 356, 360 (Ind. Ct. App. 2007) (holding that arm insurance policy did not provide coverage for claims brought by injured motorcyclist for negligence and negligent entrustment due to motor vehicle exclusion); *Graves v. Johnson*, 862 N.E.2d 716, 721-22 (Ind. Ct. App. 2007) (holding that property insurer’s payment of insurance proceeds to landlord and tenant satisfied its obligation under the policy despite the fact that tenant forged landlord’s signature and failed to give landlord his share); *West American Insurance Co. v. Cates*, 865 N.E.2d 1016, 1021-22 (Ind. Ct. App.) (holding that underinsured motorist carrier is not entitled to a setoff if the carrier unreasonably delays payment after liability insurers denied coverage), *trans. denied*, 869 N.E.2d 460 (Ind. 2007); *McGuire v. Century Surety Co.*, 861 N.E.2d 357, 365 (Ind. Ct. App. 2007) (holding that no coverage was owed for collapse of building caused by faulty workmanship); *Moreton v. Auto-Owners Insurance*, 859 N.E.2d 1252, 1255 (Ind. Ct. App. 2007) (holding subrogation insurer was not sufficiently a party to small claims action by its insured to give res judicata effect to small claims judgment); *Briles v. Wausau Insurance Cos.*, 858 N.E.2d 208, 215-16 (Ind. Ct. App. 2006) (finding that hotel employee was not a permissive user of hotel shuttle van due to violation of express restrictions); *McCarty v. Walsko*, 857 N.E.2d 439, 447 (Ind. Ct. App. 2006) (holding patient could not proceed against Patients Compensation Fund because doctor’s underlying liability limits had not been exhausted); *Safe Auto Insurance Co. v. Farm Bureau Insurance Co.*, 856 N.E.2d 156, 162 (Ind. Ct. App. 2006) (holding insured’s failure to tell insurer about her husband did not void coverage and insured was vicariously liable for husband’s actions under Michigan law), *opinion superseded on reh’g*, 867 N.E.2d 221 (Ind. Ct. App.), *trans. granted*, 878 N.E.2d 210 (Ind. 2007); *Wineinger v. Ellis*, 855 N.E.2d 614, 618-19 (Ind. Ct. App. 2006) (finding that trial court properly barred reference to insurance or insurer in uninsured motorist case), *trans. denied*, 869 N.E.2d 448 (Ind. 2007); *State Farm Mutual Automobile Insurance Co. v. Noble*, 854 N.E.2d 925, 932 (Ind. Ct. App. 2006) (finding that issue of fact existed regarding whether husband had authority to bind his wife when he rejected underinsured motorist coverage), *trans. denied*, 869 N.E.2d 448 (Ind. 2007).

priority or sharing of these coverages.³ Until recently, courts typically found the clauses irreconcilable and “mutually repugnant” such that each policy shared in coverage.⁴

The Indiana appellate courts addressed the applicability of competing “other insurance” clauses in two cases⁵ during the survey period. In both instances, it was held that the clauses were reconcilable and not mutually repugnant.

In *Citizens Insurance Co. v. Ganschow*,⁶ Cletus Ganschow was injured when the vehicle in which he was a passenger collided with an uninsured driver.⁷ Ganschow filed a lawsuit to recover uninsured motorist benefits from his parents’ automobile insurer, Citizens Insurance Company (“Citizens”), and from the insurer for the vehicle’s owner, Standard Mutual Insurance Company (“Standard”). Standard filed a counterclaim and cross-claim for declaratory judgment asking the court to determine that both policies provided primary insurance coverage and should be prorated.⁸ Citizens argued that its coverage was excess, such that its coverage only applied after Standard’s limits were exhausted.⁹ The trial court entered summary judgment for Standard, and ordered that Ganschow’s damages be prorated between Standard’s and Citizens’s policies.¹⁰ Citizens appealed the trial court’s decision.¹¹

On appeal, there was no dispute that Ganschow qualified as an insured under both policies, and the sole issue to be determined was the share of damages that each insurer should be required to pay.¹² The policy issued by Standard contained the following “other insurance” provision:

3. For sample language of an “other insurance” clause, see *General Accident Insurance Co. of America v. Hughes*, 706 N.E.2d 208, 209 (Ind. Ct. App. 1999) (“If there is other applicable liability insurance we will pay only our share. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance and the insurance on such a vehicle and any other collectible insurance shall be primary.”).

4. See *Ind. Ins. Co. v. Am. Underwriters, Inc.*, 304 N.E.2d 783, 787 (Ind. 1973) (finding the compared “other insurance” clauses to be “mutually repugnant” which required a pro rata allocation); but see *Am. Econ. Ins. Co. v. Motorists Mut. Ins. Co.*, 605 N.E.2d 162, 164-65 (Ind. 1992) (approving court of appeals’s decision determining priority of insurance coverages, but reversing on other grounds).

5. *Citizens Ins. Co. v. Ganschow*, 859 N.E.2d 786 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 458 (Ind. 2007); see also *Cincinnati Ins. Co. v. Am. Alternative Ins. Corp.*, 866 N.E.2d 326 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007). *Cincinnati Insurance Co.* will not be analyzed in detail because the reasoning employed is substantially similar to that of *Citizens Insurance Co.*

6. 859 N.E.2d 786.

7. *Id.* at 788.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, *the insurance under part IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.*

Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance and the company shall not be liable for a greater proportion of any loss to which this Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.¹³

The policy issued by Citizens contained an "other insurance" provision which read as follows:

1. Any recovery for damages for "bodily injury" or "property damage" sustained by an "insured" may equal but not exceed the higher of the applicable limit for any one vehicle under this insurance or any other insurance.
2. Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.
3. We will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits.¹⁴

Standard argued that pursuant to existing case law, where two potentially applicable insurance policies both contain "other insurance" clauses, the clauses are "mutually repugnant" to each other and should be disregarded, making both insurers liable for damages on a prorated basis.¹⁵ Conversely, Citizens argued that the existence of "other insurance" clauses in two potentially applicable insurance policies did not require the clauses to be disregarded if the clauses could be reconciled.¹⁶ Citizens asserted that the two "other insurance" clauses at issue were reconcilable because under its policy, the insurance provided was clearly excess if Ganschow's injuries arose while riding in a vehicle that he did not own, and Standard's insurance coverage was only excess if other "similar

13. *Id.* at 788.

14. *Id.*

15. *Id.* at 790 (citing *Ind. Ins. Co. v. Am. Underwriters, Inc.*, 304 N.E.2d 783 (Ind. 1973)).

16. *Id.* at 791 (citing *Am. Econ. Ins. Co. v. Motorists Mut. Ins. Co.*, 593 N.E.2d 1242 (Ind. Ct. App.), *aff'd in part, vacated in part*, 605 N.E.2d 162 (Ind. 1992)).

insurance” was applicable to cover the loss.¹⁷

The court of appeals agreed with Citizens’s position, and reversed the trial court’s entry of summary judgment.¹⁸ The court held that there was no blanket rule under Indiana law that all competing “other insurance” clauses must be found unenforceable.¹⁹ The court stated that because it could harmonize the two “other insurance” clauses at issue, it was free to give effect to the parties’ intent.²⁰ Accordingly, the court gave instructions for the trial court to enter judgment that Citizens’s policy was excess with respect to Ganschow’s claims.²¹

This decision is important to the practice of insurance law because it clarifies that not all competing “other insurance” clauses will be ignored as some practitioners have urged. If the clauses can be reconciled, then they will be given their intended effect.

B. Claimant’s Recovery of Benefits from Tortfeasor’s Insurer Eliminated Underinsured Motorist Carrier’s Liability

The decision of *Kinslow v. Geico Insurance Co.*²² provides a good analysis of the proper method for calculating a set-off in an underinsured motorist case. In *Kinslow*, a wife sustained serious injuries and her husband died after being involved in an accident while riding their motorcycles.²³ The wife filed suit against the negligent tortfeasor and her own underinsured motorist carrier.²⁴ The tortfeasor’s insurer paid its policy limits of \$100,000 to the wife for her injuries and another payment of \$100,000 for the death of her husband.²⁵

The wife’s underinsured motorist coverage provided limits of \$100,000 per person and \$300,000 per accident.²⁶ Her insurer filed a motion for summary judgment on the basis that after setting off the amounts received by the wife from the tortfeasor’s insurer, the underinsurance limits were exhausted.²⁷ The trial court granted the insurer’s motion for summary judgment, and the wife appealed.²⁸

For purposes of appeal, it was assumed that the wife’s damages totaled at

17. *Id.*

18. *Id.*

19. *Id.*; see *Am. Econ. Ins. Co.*, 593 N.E.2d at 1242.

20. *Id.* at 793.

21. *Id.* at 795.

22. 858 N.E.2d 109 (Ind. Ct. App. 2006).

23. *Id.* at 110.

24. *Id.*

25. *Id.*

26. *Id.* The applicable policy language provided that “any amounts otherwise payable for damages under this coverage shall be reduced by: All sums paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible.” *Id.* at 111.

27. *Id.* at 110.

28. *Id.* at 111.

least \$400,000.²⁹ The wife argued that the proper method of applying a set-off was to subtract the amounts paid by the underlying tortfeasor from the amount of total damages incurred, and thus, she was entitled to recover \$200,000 from her underinsured motorist carrier.³⁰ The underinsured motorist carrier countered that the amounts paid by the underlying tortfeasor should be subtracted from the limits of the underinsured motorist policy.³¹

The court acknowledged that Indiana case law was split with regard to the proper calculation of a set-off.³² However, the court held that it was compelled to find in favor of the underinsured motorist carrier because of Indiana Code section 27-7-5-5(c),³³ which was to be read into every underinsured motorist policy and unambiguously demonstrated that all amounts received from the tortfeasor's insurer should be set off from the applicable underinsured motorist limits.³⁴

This opinion reiterates the proper method of calculating a setoff under Indiana law.³⁵ Although other cases have provided a similar analysis in recent years, this case is important because it focuses on the statutory mandate regarding set-offs as opposed to the somewhat conflicted and confusing existing caselaw.

29. *Id.* at 114.

30. *Id.* at 111.

31. *Id.*

32. *Id.* at 113-14. The wife contended that the Indiana Supreme Court's decision in *Beam v. Wausau Insurance Co.*, 765 N.E.2d 524 (Ind. 2002) supported her position. *Kinslow*, 858 N.E.2d at 113. The insurers contended that the supreme court's decision in *American Economy Insurance Co. v. Motorists Mutual Insurance Co.*, 605 N.E.2d 162 (Ind. 1992) applied. *Kinslow*, 858 N.E.2d at 113.

33. *Kinslow*, 858 N.E.2d at 114. Pursuant to Indiana Code section 27-7-5-5(c): The maximum amount payable for bodily injury under uninsured or underinsured motorist coverage is the lesser of:

(1) the difference between:

(A) the amount paid in damages to the insured by or for any person or organization who may be liable for the insured's bodily injury; and

(B) the per person limit of uninsured or underinsured motorist coverage provided in the insured's policy; or

(2) the difference between:

(A) the total amount of damages incurred by the insured; and

(B) the amount paid by or for any person or organization liable for the insured's bodily injury.

IND. CODE § 27-7-5-5(c) (2004).

34. *Kinslow*, 858 N.E.2d at 114.

35. *See Am. Econ. Ins. Co.*, 605 N.E.2d 164-65.

*C. Liability Insurer Satisfied Its Duty to Insured by Interpleading
Its Liability Limits*

The case of *Mahan v. American Standard Insurance Co.*³⁶ is an important case with potentially broad application regarding an insurance company's duty to its insureds when the insured faces multiple claims that will likely exceed his or her policy limits. In a liability insurance policy, an insurer possesses a duty to defend its insured against any lawsuits filed because of a covered occurrence, as well as a duty to indemnify its insured for any settlements or judgments reached up to the policy limits.

Mahan, who had been drinking alcohol, negligently operated his vehicle, colliding with another vehicle causing injuries to six passengers.³⁷ At the time of the accident, Mahan was insured under an automobile policy with American Standard Insurance Company ("American Standard") with liability limits of \$50,000 per person and \$100,000 per accident.³⁸ The policy also contained the following provision: "We will defend any suit or settle any claim for damages payable under this policy as we think proper. HOWEVER, WE WILL NOT DEFEND ANY SUIT AFTER OUR LIMIT OF LIABILITY HAS BEEN PAID."³⁹

Because of the perceived likelihood that the injured parties' damages would exceed the per accident limit in its policy, American Standard notified Mahan that he should consider hiring personal counsel to defend against his exposure for a judgment in excess of his insurance coverage.⁴⁰ American Standard filed an interpleader action and tendered its full liability policy limits with the court to be distributed to Mahan and the injured parties as the court decided each party was entitled.⁴¹ The interpleader complaint also sought a judicial determination that American Standard was relieved of its obligation to defend Mahan in the passengers' lawsuits.⁴² Mahan filed an answer to the interpleader complaint and asserted that American Standard had a duty to defend him in the matter despite the complaint in interpleader and that American Standard's refusal to defend him amounted to a breach of the insurer's duty of good faith.⁴³

Over Mahan's objection, the trial court issued an order distributing the funds to the injured parties and enjoining all of the injured parties from commencing any further action against American Standard or Mahan.⁴⁴ Subsequently, Mahan and American Standard filed cross-motions for summary judgment on the issue

36. 862 N.E.2d 669 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 456 (Ind. 2007).

37. *Id.* at 671.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 671-72.

42. *Id.* at 672.

43. *Id.*

44. *Id.* at 673.

of American Standard's duty to defend Mahan and the alleged bad faith claim.⁴⁵ The trial court entered summary judgment for American Standard, and Mahan appealed.⁴⁶

On appeal, the court determined that because there had not been a lawsuit filed against Mahan, American Standard had no duty to defend him.⁴⁷ Additionally, the court rejected Mahan's argument that American Standard acted in bad faith because it never attempted to obtain a release agreement for the benefit of Mahan before it interpleaded the policy limits.⁴⁸ The court concluded that an insurer only commits bad faith if it: (1) makes an "unfounded refusal" in making payment; (2) "caus[es] an unfounded delay in making payment; (3) deceiv[es] the insured"; or (4) "exercis[es] any unfair advantage to pressure an insured into settlement of a claim."⁴⁹ Finding that American Standard had not done any of the above, the court ruled that American Standard had a rational basis for filing the interpleader and did not breach its duty of good faith.⁵⁰

This decision is important because it is the first reported case in Indiana that holds that an insurer does not have a duty to defend its insured if no lawsuit is filed by the alleged victims, and an insurer can satisfy its duty to indemnify before any lawsuit is filed by interpleading its liability limits. An insurer should be able to interplead its policy limits on serious cases without fear of breaching its duty of good faith owed to the insured.

D. Insured Could Not Recover Underinsured Motorist Benefits for Injury Caused by "Miss and Run" Driver

The decision of *Von Hor v. Doe*⁵¹ addressed the significance of the "physical contact" requirement that is commonly found in the definition of an underinsured motorist.⁵² As the insured, Von Hor drove his motorcycle, and an unidentified automobile driver suddenly swerved into his lane.⁵³ Von Hor swerved to the right to avoid a collision, but his motorcycle struck a curb, causing him to crash and sustain serious injuries.⁵⁴

At the time of the accident, Von Hor was insured by State Farm under a policy that provided uninsured motorist coverage.⁵⁵ The policy defined an "uninsured motor vehicle" as "a 'hit-and-run' land motor vehicle whose owner or driver remains unknown and which **strikes** . . . the *insured*; or . . . the vehicle

45. *Id.* at 673-74.

46. *Id.* at 675.

47. *Id.* at 676.

48. *Id.* at 677.

49. *Id.* (citing *Erie Ins. Co. v. Hickman ex rel. Smith*, 622 N.E.2d 515, 519 (Ind. 1993)).

50. *Id.*

51. 867 N.E.2d 276 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007).

52. *Id.* at 277.

53. *Id.*

54. *Id.*

55. *Id.*

the *insured* is occupying and causes *bodily injury* to the *insured*.”⁵⁶ Von Hor brought a lawsuit against State Farm seeking uninsured motorist coverage.⁵⁷

State Farm filed a motion for summary judgment alleging that it owed no coverage because the tortfeasor’s vehicle did not meet the definition of an uninsured vehicle because the unidentified vehicle did not “strike” Von Hor or his motorcycle.⁵⁸ The court granted summary judgment for State Farm, and Von Hor appealed.⁵⁹

On appeal, Von Hor admitted that the tortfeasor’s vehicle did not strike him, but urged the court to adopt the “corroborative evidence test” which places liability on an uninsured motorist insurer for miss-and-run accidents if a third party can corroborate the insured’s allegations that the negligence of an unidentified vehicle proximately caused the accident.⁶⁰ Von Hor argued that public policy considerations supported adoption of the corroborative evidence test for “miss and run” uninsured motorist cases.⁶¹ However, the court refused to adopt the corroborative evidence rule and found that actual physical contact was required for there to be uninsured motorist coverage available.⁶² The court relied substantially on existing case law which clearly indicated that “miss and run” drivers were not uninsured motorists.⁶³

Because Indiana courts have continually enforced insurance policy requirements of physical contact with unidentified drivers, Von Hor faced a difficult challenge to convince the court to change the law. In this case the court enforced the plain terms of the policy which required physical contact to satisfy the definition of uninsured motorist.

E. Insureds Could Not Recover Under Their Underinsured Motorist Coverage Because Tortfeasor’s Vehicle Was Not Underinsured

During the survey period, the Indiana Court of Appeals had an opportunity to provide further explanation of the definition of an underinsured motorist in *Auto-Owners Insurance Co. v. Eakle*.⁶⁴ In *Eakle*, the plaintiff driver and his two passengers were seriously injured when they were involved in an automobile

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 278.

60. *Id.* at 279 (citing *Girgis v. State Farm Mut. Auto. Ins. Co.*, 662 N.E.2d 280, 282 (Ohio 1996)).

61. *Id.*

62. *Id.*

63. *Id.* at 278-79 (citing *Rice v. Meridian Ins. Co.*, 751 N.E.2d 685 (Ind. Ct. App. 2001)).

64. 869 N.E.2d 1244 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 218 (Ind. 2007); *see also* *Clark v. State Farm Mut. Auto Ins. Co.*, 473 F.3d 708, 714 (7th Cir. 2007) (applying Indiana law and holding that where multiple claimants make a claim for benefits under a single underinsured motorist policy, the court should compare the per accident limits of the underinsurance policy with the liability limits of the tortfeasor).

accident after a third-party tortfeasor ran a red light.⁶⁵ The plaintiff driver and his passengers brought a claim against the tortfeasor's insurer, and the plaintiff driver's wife also brought a claim for loss of consortium.⁶⁶ The tortfeasor's insurer agreed to pay the four claimants its per accident policy limit of \$500,000, and the claimants accepted.⁶⁷ The claimants sued their underinsured motorist carrier, which possessed limits of \$500,000 per person and \$500,000 per accident, to recover additional damages.⁶⁸ The underinsured motorist carrier defended on the basis that the tortfeasor's vehicle was not underinsured.⁶⁹ On cross-motions for summary judgment, the court entered summary judgment in favor of the plaintiffs, finding that the tortfeasor's vehicle was underinsured.⁷⁰

On appeal, the underinsured motorist insurer contended that the tortfeasor was not "underinsured" because a comparison of the "per accident" policy limits of the tortfeasor and underinsured motorist insurer were equal (\$500,000).⁷¹ The claimants argued that because the actual per person payments from the tortfeasor's insurer were less than the per person limit of \$500,000 under the underinsured motorist coverage, the tortfeasor's vehicle was underinsured.⁷²

The court reviewed existing case law and determined that the tortfeasor's vehicle was not underinsured.⁷³ According to the court, the goal of underinsured motorist coverage "is to give the insured *at least the same* coverage as if his or her own underinsurance policy was the only one that applied."⁷⁴ Consequently, the court compared the per accident limits of the tortfeasor's policy and the claimant's underinsurance policy.⁷⁵ The court determined that because both policies had \$500,000 per accident limits, the tortfeasor's automobile was not underinsured.⁷⁶

F. Forum Selection Clause in Underinsured Motorist Policy Held Unenforceable

In *Farm Bureau General Insurance Co. of Michigan v. Sloman*,⁷⁷ the court was confronted with the issue of the enforceability of a forum selection clause.⁷⁸

65. *Auto-Owners Ins. Co.*, 869 N.E.2d at 1245.

66. *Id.*

67. *Id.*

68. *Id.* at 1247.

69. *Id.*

70. *Id.*

71. *Id.* at 1248.

72. *Id.*

73. *Id.* at 1253.

74. *Id.* (quoting *Grange Ins. Co. v. Graham*, 843 N.E.2d 597, 602 (Ind. Ct. App. 2006) (emphasis added)).

75. *Id.*

76. *Id.*

77. 871 N.E.2d 324 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 219 (Ind. 2007).

78. *Id.* at 326.

The insured, Sloman, purchased an insurance policy with uninsured motorist coverage in Michigan.⁷⁹ Sloman was injured in a motor vehicle accident with a negligent uninsured motorist in Indiana.⁸⁰ As a result, Sloman filed a lawsuit against his uninsured motorist carrier, Farm Bureau General Insurance Co. ("Farm Bureau") in Elkhart County, Indiana.⁸¹ Sloman's insurance policy with Farm Bureau contained a forum selection clause which required any suit brought against Farm Bureau to be brought in Michigan, where the policy was purchased.⁸²

Farm Bureau moved for summary judgment on the basis that Elkhart County, Indiana was not a proper forum.⁸³ The trial court denied the motion because it found that the forum selection clause was unenforceable as contrary to Indiana law. Farm Bureau appealed.⁸⁴

The appellate court held that to determine the validity of a forum selection clause, the court must determine whether the clause was "freely negotiated" and whether it was "just and reasonable."⁸⁵ After reviewing the record, the court did not find any evidence that the forum selection clause was not freely negotiated between the parties to the policy.⁸⁶ With respect to whether the forum selection clause was just and reasonable, the court employed a four-part test to determine whether the clause: (1) limited the fora in which the insurer could be subject to suit; (2) conserved judicial resources; (3) passed on economic benefits to the consumer; and (4) caused problems with multiple litigation.⁸⁷

The court held that the forum selection clause was unenforceable for several reasons.⁸⁸ First, the court found that the forum selection clause did not limit the fora in which the insurer could be sued because the insured was free to sue the tortfeasor in Indiana, and the insurer would be forced to intervene as a necessary party to avoid being bound by the trial court judgment.⁸⁹ Second, the court found that the sound public policies of preventing multiple litigation and conserving

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 327. The policy language provided: "Any court action for any dispute regarding coverage . . . or any dispute regarding whether a person is entitled to recover compensatory damages . . . must take place in the venue of the county and state in which the policy was purchased." *Id.* at 327.

83. *Id.* Farm Bureau also defended on the basis that Sloman did not bring his action within one year as required by the policy, but the court found that there was a question of fact regarding whether Sloman complied with the policy's requirements. *Id.* at 327-28.

84. *Id.* at 328.

85. *Id.* at 329-30.

86. *Id.*

87. *Id.* at 331-34.

88. *Id.*

89. *Id.* at 331; *see Stewart v. Walker*, 597 N.E.2d 368, 376 (Ind. Ct. App. 1992) (holding that in order to assert defenses available to tortfeasor, uninsured motorist insurer must intervene in lawsuit filed by insured against tortfeasor).

judicial resources were not furthered by the forum selection clause because the insured would be forced to file suit against the uninsured motorist in Indiana while being forced to litigate against his uninsured motorist carrier in Michigan.⁹⁰ Finally, the court found that there was no legitimate argument that economic benefits would be passed onto the consumer due to the forum selection clause because it was unlikely that Farm Bureau would recognize any economic benefit from the forum selection clause.⁹¹

G. Court Ordered Assignment of Potential Claim for Breach of Duty of Good Faith Was Invalid

In *State Farm Mutual Automobile Insurance Co. v. Estep*,⁹² the Indiana Supreme Court was confronted with the interesting issue of whether a court could order an insured to assign the insured's claim for breach of the duty of good faith ("bad faith claim") owed by the insurer to another.⁹³ A creditor, who possessed a judgment against the insured, brought a proceeding supplemental to collect on the judgment.⁹⁴ The creditor requested that the trial court order the insured to assign any potential "bad faith claims" against the insured's insurance company to the creditor.⁹⁵ The trial court granted the creditor's request, even though the insured did not believe the insurer breached the duty of good faith.⁹⁶

The insurer moved to intervene in the proceedings supplemental and asked the court to vacate the assignment order.⁹⁷ The trial court denied the insurer's motion to intervene, and the insurer appealed.⁹⁸ The court of appeals reversed in part and affirmed in part the trial court's decision.⁹⁹ The court of appeals found that the insurer should have been afforded an opportunity to intervene, but also ruled that the forced "bad faith" claim assignment could occur if a viable claim existed.¹⁰⁰

The Indiana Supreme Court granted transfer¹⁰¹ and found that the order assigning the debtor's potential bad faith claim was invalid for a number of reasons.¹⁰² First, the proposed assignment was inconsistent with the "Direct Action Rule" which prohibits a plaintiff from pursuing a lawsuit directly against

90. *Farm Bureau Gen. Ins. Co. of Mich.*, 871 N.E.2d at 331-34.

91. *Id.* at 332-33.

92. 873 N.E.2d 1021 (Ind. 2007).

93. *Id.* at 1023.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1024.

98. *Id.*

99. *State Farm Mut. Auto. Ins. Co. v. Estep*, 818 N.E.2d 114, 126 (Ind. Ct. App. 2004), *vacated*, 873 N.E.2d 1021 (Ind. 2007).

100. *Id.*

101. *State Farm Mut. Auto Ins. Co. v. Estep*, 831 N.E.2d 748 (Ind. 2005).

102. *State Farm Mut. Auto Ins. Co.*, 873 N.E.2d at 1024.

a tortfeasor's insurer based on the actions of the insured tortfeasor.¹⁰³ Second, allowing forced assignments of bad faith claims would result in increased litigation because judgment creditors would begin to sue the insurance companies as a matter of course.¹⁰⁴ Third, allowing the assignments would negatively affect settlement negotiations due to the possibility of an excess coverage claim and the cost of litigating it.¹⁰⁵ Finally, all insureds would suffer from increased costs due to the added expenses associated with insurance companies' litigation against assigned "bad faith claims."¹⁰⁶

II. HOMEOWNERS CASES

A. *Trampoline Exclusion in Homeowners Policy Held Unenforceable Due to Structural Ambiguity*

In *National Mutual Insurance Co. v. Curtis*,¹⁰⁷ the Indiana Court of Appeals was asked to determine whether a trampoline exclusion in a homeowners insurance policy was enforceable.¹⁰⁸ While attending a party at the insured's home, the plaintiff was injured after using a trampoline.¹⁰⁹ As a result, the plaintiff filed a lawsuit against the insurance company for the insured seeking a declaratory judgment on whether the insurer owed coverage to the insured for the accident.¹¹⁰ The insurer argued that by endorsement to the policy, coverage was excluded for bodily injury "[a]rising out of the ownership, maintenance or use of a trampoline."¹¹¹ At the trial court, the plaintiff and insurer filed cross-motions for summary judgment on the coverage question, and the court found as a matter of law that coverage existed.¹¹² The insurer appealed the trial court's decision.¹¹³

The trampoline exclusion was contained in a portion of the policy titled "Supplemental Exclusions."¹¹⁴ The issue facing the appellate court was whether

103. *Id.* at 1026. The supreme court stated that Direct Action Rule was "well settled" in Indiana with only one limited exception where the plaintiff brings a declaratory judgment lawsuit against the insurer to determine whether the insured possesses liability coverage. *Id.* at 1026 n.10; *see also* *City of South Bend v. Century Indem. Co.*, 821 N.E.2d 5, 10 (Ind. Ct. App. 2005).

104. *State Farm Mut. Auto. Ins. Co.*, 873 N.E.2d at 1027.

105. *Id.* The supreme court observed that potential conflicts of interest between insureds and insurers would be exacerbated because of the insurer's duty to protect its insured from a judgment in excess of the policy limits. *Id.*

106. *Id.*

107. 867 N.E.2d 631 (Ind. Ct. App. 2007).

108. *Id.* at 632.

109. *Id.* at 633.

110. *Id.*

111. *Id.*

112. *Id.* at 633-34.

113. *Id.* at 634.

114. *Id.* at 635.

the exclusion, which appeared to exclude coverage on its face, was appropriately placed within the policy to inform the insured or whether it created an ambiguity such that it could not be enforced.¹¹⁵ The court defined its task as an attempt “to reconcile the seemingly contradictory duty of an insurance company to provide an unambiguous and clear policy with the duty of an insured to read his insurance policy.”¹¹⁶

The court carefully reviewed the relevant insurance policy and found that the homeowners policy at issue was eighteen pages long and was modified by the fourteen page “Supplemental Extension” document.¹¹⁷ The insuring agreement in the main portion of the policy indicated coverage for personal liability “[i]f a claim is made or a suit is brought against an ‘insured’ for damages because of ‘bodily injury’ or ‘property damage’ caused by an ‘occurrence’ to which this coverage applies.”¹¹⁸ The trampoline exclusion was located approximately fourteen pages from the location of the other exclusions within the policy.¹¹⁹

The appellate court held that the policy was ambiguous because of its confusing structure and the placement of the exclusion in an area separated from the other exclusions.¹²⁰ Therefore, the court refused to enforce the exclusion and held that the insurer owed coverage.¹²¹

Insurance practitioners should be aware of the significance of this case. While the *Curtis* court recognized that the insurer is free to limit coverage, it must do so in a manner that does not confuse the insured.¹²² As this court concluded, merely placing the limiting language in an unusual location can render the policy ambiguous.¹²³

*B. Alleged Child Molestation Was Not a Covered Loss
Due to Child Care Exclusion*

In *T.B. ex rel. Bruce v. Dobson*,¹²⁴ the court was asked to determine whether a minor’s lawsuit against the insured homeowners for alleged molestation was covered under the homeowners insurance policy.¹²⁵ T.B. brought a lawsuit against the insured husband and wife after the child was molested by the husband while at their home for child care services.¹²⁶ T.B. also notified the insureds’

115. *Id.*

116. *Id.*

117. *Id.* at 636.

118. *Id.* at 632-33.

119. *Id.* at 635.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. 868 N.E.2d 831 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 220 (Ind. 2007).

125. *Id.* at 833.

126. *Id.*

homeowner's insurer, State Farm, of the lawsuit.¹²⁷ Upon receiving notice of the claim, State Farm investigated the claim and denied coverage because of a child care exclusion in the policy.¹²⁸

T.B. settled her claim with the insureds, but agreed to only enforce the judgment against State Farm.¹²⁹ T.B. filed a motion for proceedings supplemental against State Farm to collect the settlement from State Farm's policy.¹³⁰ State Farm responded by asserting that no coverage was available because of the child care exclusion.¹³¹ On cross motions for summary judgment, the court ruled in favor of T.B., and State Farm appealed.¹³²

On appeal, the issue before the court was whether the child care exclusion applied.¹³³ The exclusion stated:

1. Coverage L . . . [does] not apply to:

. . . .

i. any claim made or suit brought against any insured by:

(1) any person who is in the care of any insured because of child care services provided by or at the direction of:

(a) any insured;

(b) any employee of any insured; or

(c) any other person actually or apparently acting on behalf of any insured; or

(2) any person who makes a claim because of bodily injury to any person who is in the care of any insured because of child care services provided by or at the direction of:

(a) any insured;

(b) any employee of any insured; or

(c) any other person actually or apparently acting on behalf of any insured.

This exclusion does not apply to the occasional child care services

127. *Id.*

128. *Id.* at 833-34.

129. *Id.* at 834.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

*provided by any insured, or to the part-time child care services provided by any insured who is under 19 years of age[.]*¹³⁴

T.B. argued that the exclusion was ambiguous because the term “occasional” found within the exclusion was not defined.¹³⁵ Alternatively, T.B. contended that while the wife admittedly provided more than occasional child services, the husband only provided child care services sporadically and that T.B.’s loss arose out of the husband’s supervision.¹³⁶

The evidence revealed that his wife operated the day care in her home five days a week for approximately twenty-five years.¹³⁷ Additionally, the wife provided day care services to T.B. for nearly ten years.¹³⁸ On one particular day, the wife left T.B. with the husband for a short time, and the husband molested T.B.¹³⁹

Based on this evidence, the court held that the child care exclusion applied to exclude coverage.¹⁴⁰ First, the court found that the term “occasional” was not ambiguous.¹⁴¹ Next, with respect to determining whether child care services were rendered “occasionally,” the court held that the relevant question was not whether the husband’s child care services were occasional, but rather whether T.B.’s care was occasional.¹⁴² Because the court held that T.B.’s care was more than occasional, the exclusion eliminated any coverage obligation of State Farm.¹⁴³

C. Insurer Did Not Have a Duty to Defend Insureds Due to Business Exclusion

In *Kessel v. State Automobile Mutual Insurance Co.*,¹⁴⁴ the court was asked to interpret a business exclusion found within a homeowners insurance policy. The insured homeowners leased a barn on their property to a horse boarding and riding business.¹⁴⁵ The homeowners owned a dog which ran free on the property.¹⁴⁶ The owner of the horse boarding business had encouraged the homeowners to allow the dog to run loose because she felt more secure with the dog present.¹⁴⁷ On one particular day, a customer of the horse boarding business,

134. *Id.* at 835-36 (emphasis added).

135. *Id.* at 837.

136. *Id.*

137. *Id.* at 833.

138. *Id.*

139. *Id.*

140. *Id.* at 837.

141. *Id.*

142. *Id.* at 838.

143. *Id.*

144. 871 N.E.2d 335 (Ind. Ct. App. 2007).

145. *Id.* at 336.

146. *Id.*

147. *Id.*

Jessica Howell, came to the property to ride her horse.¹⁴⁸ As Howell was leaving, she noticed the homeowners' dog appeared to be shaking from cold.¹⁴⁹ As Howell attempted to cover the dog with a towel, the dog bit her.¹⁵⁰

Howell filed suit against the owner of the horse boarding business and the homeowners to recover for her personal injuries.¹⁵¹ The liability insurer for the homeowners filed a declaratory judgment lawsuit to determine whether coverage was owed for Howell's lawsuit.¹⁵² The homeowners' insurer moved the trial court for summary judgment on the coverage issue by contending the policy excluded coverage for bodily injury incidents "arising out of or in connection with a 'business.'"¹⁵³ The trial court granted the insurer's motion for summary judgment, and Howell appealed.¹⁵⁴

On appeal, the court noted that the policy phrase "in connection with" is interpreted broadly under Indiana law and determined that Howell's alleged loss was unambiguously excluded under the policy.¹⁵⁵ In doing so, the court cited approvingly the holding of the court in the North Carolina case of *Nationwide Mutual Fire Insurance Co. v. Nunn*,¹⁵⁶ which concluded that where an injured party is on the premises in connection with a business then "all of the possible proximate causes" of the injured person's injuries are "in connection with" the business.¹⁵⁷ Given this broad interpretation, the loss was clearly excluded.¹⁵⁸

This case demonstrates the broad reading that courts give to the phrase "in connection with" found within an insurance policy.¹⁵⁹ This is a common phrase found in numerous contexts in many types of insurance policies, and thus the holding in this case has potentially broad application.¹⁶⁰

*D. Homeowners Policy Did Not Apply To Workplace Assault
and Battery That Produced No Bodily Injury*

The case of *Knight v. Indiana Insurance Co.*¹⁶¹ involved the interpretation of a business exclusion and the phrase "bodily injury" within a homeowners

148. *Id.*

149. *Id.* at 336-37.

150. *Id.*

151. *Id.* at 337.

152. *Id.*

153. *Id.* at 338.

154. *Id.*

155. *Id.* at 339.

156. 442 S.E.2d 340 (N.C. Ct. App. 1994).

157. *Kessel*, 871 N.E.2d at 339-40 (citing *Nationwide Mut. Fire Ins. Co.*, 442 S.E.2d at 344).

158. *Id.*

159. *Id.*

160. *See Hartford Cas. Ins. Co. v. Evansville Vanderburgh Public Library*, 860 N.E.2d 636 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 459 (Ind. 2007).

161. 871 N.E.2d 357 (Ind. Ct. App. 2007).

policy.¹⁶² In December 1999, former Indiana University Basketball Coach Bob Knight overheard assistant basketball coach, Ronald Felling, criticize him and call him a derogatory name.¹⁶³ As a result, Knight confronted Felling over the statements.¹⁶⁴ As Felling attempted to leave the room, Knight bumped Felling, causing Felling to fall backward into a television set.¹⁶⁵ Felling was not injured in the incident.¹⁶⁶ Felling, however, filed a federal lawsuit against Knight seeking monetary damages because Knight had allegedly violated his constitutional right to be free of assault.¹⁶⁷

Knight reported the lawsuit to his homeowners insurer, and the insurer denied coverage for the suit.¹⁶⁸ The insurer denied coverage on the basis that there was no "bodily injury"¹⁶⁹ as required under the policy and that the loss was excluded under the "business"¹⁷⁰ and "expected or intended" exclusions.¹⁷¹ After settling the lawsuit with Felling, Knight filed a lawsuit against his homeowners insurer for indemnification.¹⁷² On cross-motions for summary judgment, the court entered judgment for the insurer, and Knight appealed.¹⁷³

On appeal, Knight asserted that he was entitled to indemnity for the settlement of Felling's lawsuit, and even if he was not, the insurer breached its contract by failing to reasonably investigate and defend Knight.¹⁷⁴ The court, however, rejected Knight's arguments and found that there was clearly no "bodily injury" to trigger coverage and that coverage was excluded under the unambiguous language of the business exclusion.¹⁷⁵

The court also focused on whether the insured properly refused to defend Knight in the Felling lawsuit.¹⁷⁶ While the court acknowledged that an insurer's duty to defend is broader than its duty to indemnify, it held that the refusal to defend in this case was proper.¹⁷⁷ According to the court:

As a matter of course, when the insured is charged a premium, he or

162. *Id.* at 358.

163. *Id.*

164. *Id.*

165. *Id.* at 359.

166. *Id.*

167. *Id.*

168. *Id.* at 359-60.

169. "Bodily injury" was defined as "[b]odily harm, sickness or disease, including required care, loss of services, and death that results." *Id.* at 361.

170. The policy language for this exclusion provided that no coverage existed for bodily injury "arising out of or in connection with a business engaged in by an insured." *Id.* at 362.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 362.

175. *Id.*

176. *Id.*

177. *Id.* at 362-63.

she has an expectation of a defense in the face of a lawsuit for a contemplated risk. However, in the continuum of potential claims, one may arise which is so far removed from the focus of the parties' contract that there is no question a reasonable claims manager could deny coverage and refuse to defend against it, although the refusal is at the Insurer's peril with regard to collateral estoppel.¹⁷⁸

When an insurer denies an insured's request for a defense to a lawsuit, the insurer faces being collaterally estopped from re-litigating matters decided in the litigation.¹⁷⁹ The *Knight* case demonstrates that when insurers are absolutely convinced that no coverage is owed, it may successfully refuse to defend its insured.

III. COMMERCIAL CASES

A. *Insured Breached Policy by Refusing to Submit to Examination Under Oath*

The decision of *Knowledge A-Z, Inc. v. Sentry Insurance*,¹⁸⁰ is an interesting decision that discusses an insured's obligations under a commercial general liability policy. Knowledge A-2, Inc. ("Knowledge") possessed an insurance policy with Sentry Insurance ("Sentry") which contained the following provisions outlining the insured's duties under the policy:

3. DUTIES IN THE EVENT OF LOSS OR DAMAGE

a. You must see that the following are done in the event of loss or damage to Covered Property:

* * * * *

(6) As often as may be reasonably required, permit [Sentry] to inspect the property proving the loss or damage and examine [the insured's] books and records.

* * * * *

(8) Cooperate with us in the investigation or settlement of the claim

* * * * *

b. We may examine any insured under oath while not in the presence of

178. *Id.* at 362 (citing *State Farm Fire & Cas. Co. v. T.B. ex rel. Bruce*, 762 N.E.2d 1227, 1230 (Ind. 2002)).

179. *State Farm Fire & Cas. Co.*, 762 N.E.2d at 1230.

180. 857 N.E.2d 411 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 457 (Ind. 2007).

any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim including an insured's books and records. In the event of an examination, an insured's answers must be signed.¹⁸¹

In December 2002, Knowledge made a claim with Sentry alleging that it had sustained a loss of \$1,337,012 as a result of an employee's theft of computer equipment.¹⁸² Over the next year and a half, Sentry contended that Knowledge failed to provide it with documents supporting its claim and to permit its employee to submit to an examination under oath.¹⁸³ On June 21, 2004, Sentry filed a declaratory judgment asserting that it did not owe coverage because Knowledge did not comply with the provisions under the policy outlining its duties.¹⁸⁴ The trial court granted Sentry's motion for summary judgment on the complaint, and Knowledge appealed.¹⁸⁵

Relying heavily on the recent Indiana Supreme Court case of *Morris v. Economy Fire & Casualty Co.*,¹⁸⁶ the court affirmed the trial court's ruling.¹⁸⁷ According to the court, the duties imposed on the insured by the policy were not from "cooperation clauses" that may necessitate the insurer to show some prejudice to be enforceable.¹⁸⁸ Instead, the insurer's requests for documents and an examination under oath of Knowledge's employee were mandatory and subject only to a reasonableness standard.¹⁸⁹ The insured's refusal to submit to an examination under oath was a sufficient reason for the insurer to deny coverage based upon the violation of conditions outlined in the policy.¹⁹⁰

*B. Damages to Building Caused by Negligence of a Third
Party Was Not a Covered Loss*

The court in *Hartford Casualty Insurance Co. v. Evansville Vanderburgh Public Library*¹⁹¹ was asked to analyze a "general exclusion" and an "ensuing loss" provision within an insurance policy. An insured library purchased a nearby historic building for purposes of expanding the library and also purchased an adjacent lot in order to construct an underground parking area for the new building.¹⁹² As the excavation team hired by the library was installing sheet piling around the edge of the historic building with a pile driving hammer, the

181. *Id.* at 415.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. 848 N.E.2d 663 (Ind. 2006).

187. *Knowledge A-Z, Inc.*, 857 N.E.2d at 420 (citing *Morris*, 848 N.E.2d at 666).

188. *Id.*

189. *Id.*

190. *Id.*

191. 860 N.E.2d 636 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 459 (Ind. 2007).

192. *Id.* at 638.

building was damaged.¹⁹³ When the dirt behind the sheet wall was excavated, the building suffered structural damage and had to be demolished.¹⁹⁴ The library's investigation concluded that the design and use of the pile driving hammer and earth retention system caused the damage of the building.¹⁹⁵

As a result of the damage to the building, the library submitted a claim to its property insurance company for reimbursement, and the insurer denied coverage.¹⁹⁶ The insurer relied on the "general exclusion" in its policy, which read:

We will not pay for loss or damage caused by, resulting from, or arising out of any acts, errors, or omissions by you or others in any of the following activities, regardless of any other cause or event that contributes concurrently, or in any sequence to the loss or damage:

1. Planning, zoning, developing, surveying, testing or siting property;

* * *

3. *Any of the following performed to or for any part of land, buildings, roads, water or gas mains, sewers, drainage ditches, levees, dams, other structures or facilities, or any Covered Property;*

a. *Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction; or*

b. *Furnishing of work, materials, parts or equipment in connection with the design, specifications, workmanship, repair, construction, renovation, remodeling, grading or compaction[.]*¹⁹⁷

The library argued that although the general exclusion excepted coverage for construction losses (e.g., the cost to repair defective construction work), the "ensuing loss" provision in the policy permitted coverage for loss that ensues or results from construction activities.¹⁹⁸ The ensuing loss provision, which was an exception to the general exclusion, read as follows: "*If physical loss or damage by a Covered Cause of Loss ensues, we will pay only for such ensuing loss or damage.*"¹⁹⁹ On cross motions for summary judgment, the trial court ruled for the library, and the insurer appealed.²⁰⁰

On appeal, the court analyzed the relevant policy language and reversed the

193. *Id.* at 638-39.

194. *Id.* at 639.

195. *Id.*

196. *Id.*

197. *Id.* at 641.

198. *Id.* at 644.

199. *Id.* at 641.

200. *Id.* at 638.

trial court's ruling.²⁰¹ According to the court, "[a]n exception to an exclusion cannot create coverage where none exists."²⁰² In order to determine whether coverage existed, the court had to determine what the "efficient proximate cause" of the loss was.²⁰³ The efficient proximate cause rule is a rule used in many other jurisdictions in insurance coverage cases and provides that "where a peril specifically insured against sets other causes into motion which, in an unbroken sequence, produce the result for which recovery is sought, the loss is covered, even though other events with the chain of causation are excluded from coverage."²⁰⁴ Using the "efficient proximate cause" rule, the court held that the cause of the loss was the third party's negligent construction and was excluded from coverage.²⁰⁵

This case is important because it marks the first time that an Indiana court has shown strong support for the "efficient proximate cause" rule. According to the court, "[w]e are persuaded by the analysis and reasoning of the efficient proximate cause rule in the interpretation and construction in policy language and believe that it serves the end of understandable and predictable coverage in the policy at issue here and all-risk policies in general."²⁰⁶

C. Insurer Satisfied Its Duty to Defend Insured by Interpleading Coverage Limits

In *Abstract & Title Guaranty Co. v. Chicago Insurance Co.*,²⁰⁷ the Seventh Circuit Court of Appeals was asked to determine whether an insurer had satisfied its duty to its insureds by interpleading coverage limits and refusing to defend insured. Abstract & Title Guaranty Co. ("Abstract") provided services in connection with real estate transactions.²⁰⁸ One of its employees defrauded customers and caused millions of dollars worth of deals to turn sour.²⁰⁹ When a customer contacted Abstract about the fraud, it notified its insurer of the claim, and before long it was apparent that more claims would be forthcoming.²¹⁰ According to the court, the insurance company "began to sense that claimants were circling [Abstract] much like stick-wielding children around a piñata."²¹¹

When Abstract started getting served with complaints, the insurer opted to

201. *Id.*

202. *Id.* at 646 (quoting *Amerisure Inc. v. Wurster Constr. Co.*, 818 N.E.2d 998, 1005 (Ind. Ct. App. 2004)).

203. *Id.*

204. *Id.* at 646 (citing *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1004 (Wash. 1992)).

205. *Id.*

206. *Id.* at 647.

207. 489 F.3d 808 (7th Cir. 2007).

208. *Id.* at 809.

209. *Id.* at 810.

210. *Id.*

211. *Id.*

interplead its liability limits in the federal district court in lieu of defending Abstract.²¹² The insurer instructed Abstract to hire counsel of their own choosing and seek payment for the counsel from the interpleaded funds.²¹³ After the funds were dispersed to the defrauded victims, Abstract filed a breach of contract action against its insurer alleging bad faith by the insurer in failing to defend it in the lawsuits filed.²¹⁴ On cross motions for summary judgment, the court found in favor of the insurer.²¹⁵

On appeal, the Seventh Circuit Court of Appeals had the benefit of the recently decided Indiana decision of *Mahan v. American Standard Insurance Co.*²¹⁶ to aid it in determining how an Indiana court would rule on an insurer interpleading its policy coverage limits. As the court noted, the facts of *Mahan* were substantially similar to the facts in the present case with one important difference. In *Mahan*, the court allowed the insurer to interplead its limits without defending its insured because no lawsuits were filed against the insured.²¹⁷ In the case at hand, there were pending lawsuits against Abstract when the insurer declined to defend.²¹⁸ The court, however, found that the existence of lawsuits pending against the insured was not a significant reason to deter it from making a decision in *Mahan*, and found that the insurer had satisfied its duty.²¹⁹

This case is significant because it extends *Mahan* to allow insurers to interplead funds and refuse to defend their insureds even if there are pending lawsuits against the insureds. Indiana appellate courts will likely approve this decision because the policy reasons apply to both situations.

IV. LIFE INSURANCE CASE : A BENEFICIARY COULD NOT RECOVER UNDER LIFE INSURANCE POLICY DUE TO SUICIDE EXCLUSION

The decision of *Officer v. Chase Insurance Life & Annuity Co.*²²⁰ is an interesting decision with potentially broad application. Officer, a beneficiary of his wife's life insurance policy, sought to recover \$1,000,000 in benefits after his wife committed suicide.²²¹ The relevant insurance policy contained a provision which limited coverage for a suicide that occurred within two years of the date of issue to the amount of all premiums paid under the policy.²²² Officer's wife

212. *Id.*

213. *Id.* (stating that when the funds were eventually distributed, Abstract & Title Guaranty did receive a significant portion in defense costs).

214. *Id.*

215. *Id.*

216. 862 N.E.2d 669 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 456 (Ind. 2007).

217. *Abstract & Title Guar. Co.*, 489 N.E.2d at 811.

218. *Id.* at 810.

219. *Id.* at 813.

220. 478 F. Supp. 2d 1069 (N.D. Ind.), *cert. denied*, 500 F. Supp. 2d 1083 (N.D. Ind. 2007).

221. *Id.* at 1071.

222. *Id.*

committed suicide thirty-eight days short of the two-year anniversary of the policy's date of issue.²²³ The life insurance company concluded that the suicide provision applied and paid the benefits due, which amounted to \$540 in premiums that had been paid.²²⁴

Officer rejected the \$540 and demanded full payment under the policy.²²⁵ When the insurer refused to pay more than the premiums paid pursuant to the suicide provision, Officer filed suit against the insurer.²²⁶ The insurer moved for summary judgment on Officer's complaint, and the court granted the motion.²²⁷ Officer appealed the trial court's ruling.²²⁸

On appeal, Officer argued that the insurer breached the life insurance policy due to the fact that the suicide provision in the policy did not apply because his wife had substantially performed her obligations under the policy at the time of her suicide.²²⁹ The court noted that "the doctrine of substantial performance applies 'where performance of a nonessential condition is lacking, so that the benefits received by a party are far greater than the injury done to him by the breach of the other party.'"²³⁰ The court, however, refused to apply the doctrine of substantial performance to the insurance policy and found that the suicide provision was applicable.²³¹ Therefore, the insurer's liability was limited to \$540.

This case is important because it holds that the doctrine of substantial performance will not be applied to rewrite the terms of an insurance policy.²³² Given the prevalence of time limitations in various insurance policies, this case could have wide application.

223. *Id.* at 1076.

224. *Id.* at 1072.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* Officer also argued that the suicide provision was ambiguous and invalid as a forfeiture clause. *Id.* The court rejected both of these arguments. *Id.*

230. *Id.* at 1076 (quoting *Dove v. Rose Acre Farms, Inc.*, 434 N.E.2d 931, 935 (Ind. Ct. App. 1982)).

231. *Id.*

232. *Id.*

DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW

CHRISTOPHER A. BROWN*

In reviewing intellectual property cases from the survey period, many cases were instructive in interpreting, or applying aspects of patent, trademark, copyright, trade secret, right of publicity, or similar laws. The following cases represent one person's view of the cases that had the greatest impact on intellectual property law in the past year. Three of them are patent cases, concerning the overhaul of fundamental principles of patent law and litigation, or implementation of previously-announced rules. The fourth is one of the first cases to address head-on the reach of Indiana's right of publicity law.

I. KSR: REVISION OF OBVIOUSNESS STANDARDS

Arguably the most anticipated patent opinion of the year, *KSR International Co. v. Teleflex Inc.* ("KSR")¹ is the first Supreme Court foray in decades into the fundamental question of obviousness and how the analysis of obviousness is to be performed. Starting with the seminal case of *Graham v. John Deere Co.*,² the Court stopped briefly at a few other cases in its review of precedent before making sweeping pronouncements on the nature of the obviousness issue. As further detailed below, this opinion may be considered a sea change in the consideration of obviousness, or it may turn out merely to be a "righting of the ship" toward a more practical analytical framework.

A. Obviousness Background

In the law of patents, two general criteria concerning the state of the art must be met before a patent can be granted for useful inventive subject matter. First, the subject matter must be "new" or "non-anticipated." If exactly the same machine, composition, method, or product as is being claimed in a patent application is also found on sale, described in a printed publication, patented, or otherwise within the applicable prior art, then the subject matter is "anticipated," and no patent can be granted for it. The criteria for anticipation are found in 35 U.S.C. § 102 (e.g., "A person shall be entitled to a patent unless . . . the invention was known or used by others in this country . . . before the invention thereof by the applicant . . .").³

If the subject matter is not found exactly in the applicable prior art, the applicant is not out of the woods. The concept of obviousness as a hurdle to overcome in obtaining patent protection might be found in embryonic form as early as the beginning of the Republic, according to some commentators.⁴

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1. 127 S. Ct. 1727 (2007), *rev'g* *Teleflex, Inc. v. KSR Int'l Co.*, 119 F. App'x 282 (Fed. Cir. 2005).

2. 383 U.S. 1 (1966).

3. 35 U.S.C. § 102(a) (2000).

4. See generally John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86

However, the solidification of “obviousness” as a patentability requirement began in earnest in the 1850s, with cases like *Hotchkiss v. Greenwood*⁵ and its demand that patentable subject matter have the quality of “invention.”⁶ In the words of that Court,

unless more ingenuity and skill . . . were required . . . than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In other words, the improvement [in this case] is the work of the skilful [sic] mechanic, not that of the inventor.⁷

Only where an invention has something beyond what might be considered ordinary skill in a particular field will patent protection arise.

After a century of judicial treatment, the codification of the 1952 Patent Act included a statutory statement of a requirement of nonobviousness. Section 103(a) of the Act reads:

A patent may not be obtained though the invention is not identically disclosed or described . . . [in the prior art], if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.⁸

The language of the statute provides several concepts. First, we consider the differences between the invention and the prior art and whether they are of such a character as to make the *whole* subject matter obvious. Second, the eyes through which the assessment of “obvious” is to be made are those of the hypothetical person of ordinary skill in the art. That person is deemed to have all of the prior art at his or her fingertips, and to have “ordinary” experience and/or training in the field of the invention. Third, the inquiry considers only the conditions at the time the invention was made. Later discoveries, techniques, experience, or training are not evidence of obviousness.

Once the statute was enacted, however, another fifteen years passed before the Supreme Court’s *Graham*⁹ opinion provided a framework for its use. In *Graham*, the Court set out a four-pronged objective analytical structure for obviousness questions.¹⁰ The “scope and content of the prior art are to be determined,” “the level of ordinary skill in the pertinent art resolved,” and the

TEX. L. REV. 1 (2007); Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319 (2008).

5. 52 U.S. 248 (1851).

6. *Id.* at 267.

7. *Id.*

8. 35 U.S.C. § 103(a) (2000).

9. *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

10. *Id.* at 17.

differences between the claimed subject matter and the prior art must be identified.¹¹ The fourth prong reviews any objective considerations such as commercial success of the invention, a long-felt but unsolved need in the art, or the failure of others to reach the inventor's solution, and mixes such considerations into the overall question of whether one of ordinary skill would find the invention obvious.¹² The *KSR* opinion repeated *Graham*'s goal of "uniformity and definiteness" in analyzing obviousness questions and saw *Graham* as confirming a "functional approach" to obviousness through a "broad inquiry" into the four issues noted above.¹³

Obviousness presents a variety of issues, including what the prior art shows, what the differences between the invention and the prior art are, what the level of ordinary skill in the field is, and many others, and thus is a primary issue in patent litigation as well as in prosecution and appeal in the U.S. Patent and Trademark Office. Certainly it can be said that the approximately fifty-five years since the enactment of the 1952 Patent Act have seen a wealth of cases in various jurisdictions interpreting the obviousness provision and fleshing out how it is to be applied.

B. Case History of KSR

The *KSR* opinion arose out of a dispute over a patent on automobile pedal systems.¹⁴ Teleflex Inc. sued KSR International Co. for infringement of U.S. Patent No. 6,237,565 (the Engelgau patent), claims of which were generally directed to the combination of an adjustable automobile pedal with an electronic sensor.¹⁵ The sensor sends a signal indicating the pedal's position to the computer that controls the throttle of the automobile.¹⁶ The Patent and Trademark Office ("PTO") had considered several reference patents during prosecution of the Engelgau patent, including a Redding patent that showed an adjustable pedal and a Smith patent that showed how to mount a sensor to a pedal's structure.¹⁷ However, the PTO did not have another reference during prosecution, a patent to Asano, which showed particular housing structure for an adjustable automobile pedal that allowed one of the pedal's pivot points to remain fixed as adjustments are made to the pedal.¹⁸

The district court, on KSR's motion for summary judgment, held that the relevant claim of Teleflex's patent was invalid.¹⁹ Following *Graham*'s analytical guidance, the district court determined on the summary judgment record a level

11. *Id.*

12. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1730-31 (2007).

13. *Id.* at 1739 (quoting *Graham*, 383 U.S. at 18).

14. *Id.* at 1734.

15. *Id.*

16. *Id.* at 1735.

17. *Id.*

18. *Id.* at 1737.

19. *Id.* at 1737-38.

of ordinary skill in this art and reviewed the claim and the prior art references finding “little difference” between the claim and the prior art.²⁰ The features of the relevant Teleflex patent claim were all found in one reference, the Asano patent, except for a sensor that detects a pedal’s position and sends that information to the vehicle’s throttle.²¹ Other references included such a sensor, and so all of the features of the claim were present in the prior art.

The district court also followed the Federal Circuit’s precedent in applying the “teaching, suggestion, or motivation” (“TSM”) test to the facts before it. According to the Supreme Court,

[i]t reasoned (1) the state of the industry would lead inevitably to combinations of electronic sensors and adjustable pedals, (2) [a Rixon reference] provided the basis for these developments, and (3) [another reference] taught a solution to wire chafing problems in Rixon, namely locating the sensor on the fixed structure of the pedal.²²

In other words, the judge decided from the summary judgment record that the automotive field would “inevitably” get to adjustable pedal-sensor combinations, the Rixon reference supported that conclusion, and a further reference provided some instruction to those in the field that there was a reason or benefit to placing a sensor in a particular way relative to a pedal.²³ Those findings would direct the person of ordinary skill in the art to combine the prior art sensor and adjustable pedal as in the Engelgau patent, in the district court’s view.²⁴ Other issues considered by the district court either bolstered its conclusion of obviousness or at least did not shake that conclusion.²⁵

Teleflex appealed to the U.S. Court of Appeals for the Federal Circuit. After hearing the appeal, the Federal Circuit reversed, on the basis that the district court’s analysis of obviousness did not rely on its precedent concerning the proper way to combine references against a patent or application claim.²⁶ In the Supreme Court’s words, that Federal Circuit jurisprudence centered around the TSM test, “under which a patent claim is only proved obvious if ‘some motivation or suggestion to combine the prior art teachings’ can be found in the prior art, the nature of the problem, or the knowledge of a person having ordinary skill in the art.”²⁷ In this appeal, the Federal Circuit decided that the district court

20. *Id.* at 1738.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 1734 (citing *Al-Site Corp. v. VSI Int’l, Inc.*, 174 F.3d 1308, 1323-24 (Fed. Cir. 1999); see also U.S. PATENT & TRADEMARK OFFICE, *MANUAL OF PATENT EXAMINING PROCEDURE* (MPEP) § 2141.03 (8th ed., 6 rev. 2007) (“The person of ordinary skill in the art is a hypothetical person who is presumed to have known the relevant art at the time of the invention.” (citing *In re GPAC*, 57 F.3d 1573, 1579 (Fed. Cir. 1995); *Custom Accessories, Inc. v. Jeffrey-Allan Indus., Inc.*,

had not followed the TSM test properly because it did not make the necessary findings as to the “understanding or principle” known to the hypothetical person of ordinary skill that would have motivated him or her to combine the references.²⁸ The Supreme Court characterized the Federal Circuit decision as also holding that such motivation would be lacking “unless the ‘prior art references address[ed] the precise problem that the patentee was trying to solve.’”²⁹

The Court’s recitation of the Federal Circuit’s decision went still further. After a discussion of the lower court’s analysis of the problems and solutions provided in the Asano patent and other prior art references, the Court saw the appellate conclusion that the person of ordinary skill would not have been led to the patentee’s claim as having its basis in the appellate interpretation of the references. The Court specifically noted the Federal Circuit’s dismissal of any supposition that the combination of the references might have been obvious to try as irrelevant in light of prior case law.³⁰

As will be seen, the Supreme Court rejected practically all of these ideas in reinstating the district court’s summary judgment of invalidity for obviousness. In doing so, significant portions of Federal Circuit jurisprudence on the question of obviousness were at least revised and reinterpreted. These revisions will have—indeed, already have had—a marked effect on the judgments of the PTO on obviousness during prosecution of patent applications and related proceedings, as well as the analyses and breadth of evidence available in federal court challenges to patent validity.

C. The Supreme Court Analysis

The major point made by the Court in *KSR* is that the objective analytical framework set forth in *Graham*, wielded flexibly on a case-by-case basis by courts, is still the elemental test for obviousness.³¹ Rigid tests, or application of additional factors or analyses, are not to be required.³² The Court proceeded to note what it viewed as a series of errors in the Federal Circuit’s approaches to obviousness in general and its treatment of the underlying case in particular.³³

The Court began with a recitation of the “need for caution in granting a

807 F.2d 955, 962 (Fed. Cir. 1986); *Env'tl. Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 696 (Fed. Cir. 1983)). “A person of ordinary skill in the art is also a person of ordinary creativity,” and may “be able to fit the teachings of multiple patents together like pieces of a puzzle.” *KSR*, 127 S. Ct. at 1742.

28. *KSR*, 127 S. Ct. at 1738.

29. *Id.* at 1738-39 (alteration in original) (citing *Teleflex, Inc. v. KSR Int'l Co.*, 119 F.App'x 282, 288 (Fed. Cir. 2005)).

30. *Id.* at 1739 (citing *In re Deuel*, 51 F.3d 1552 (Fed. Cir. 1995)); see *infra* note 34 (regarding prior ban on an “obvious to try” standard for evaluating obviousness).

31. *KSR*, 127 S. Ct. at 1739.

32. *Id.*

33. *Id.* at 1741-43.

patent based on the combination of elements found in the prior art.”³⁴ Certainly that beginning is some suggestion of a desire to emphasize vigorous application of the obviousness provisions, if not to draw inward the limits of patentability and leave more developments outside of those limits. The Court went on to cite three post-*Graham* cases with approval.³⁵ The first, *United States v. Adams*,³⁶ concerned battery technology that differed from the prior art in two particular ways. According to the Court, its *Adams* opinion “recognized that when a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result.”³⁷ Nevertheless, *Adams* found the claims at issue nonobvious because the relevant prior art directed those in the field away from the solution the inventor found.³⁸ It is not clear from the Court’s discussion of *Adams* whether it was the teachings of the prior art or the unexpected success of the inventor’s solution (or some combination of both) that tipped the obviousness balance in his favor.

Next on the Court’s list was *Anderson’s-Black Rock, Inc. v. Pavement Salvage Co.*³⁹ In that case, the patented subject matter combined two prior art elements, and the Court’s opinion decided that such a combination did not provide what the *KSR* Court called “some new synergy” or unexpected benefit.⁴⁰ The lesson drawn from this case was that a combination of old elements that “‘add[s] nothing to the nature and quality’” of the items previously patented was not patentable, even though that combination in fact performed a useful

34. *Id.* at 1739. It based that statement at least in part on its opinion in *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147 (1950), which came prior to the 1952 Patent Act and its codification of obviousness in the provisions of 35 U.S.C. § 103 (2000). *KSR*, 127 S. Ct. at 1739. Perhaps recognizing a possible problem, the Court brushed it aside with the statement that the enactment of section 103 did not disturb “earlier instructions” concerning the “need for caution” noted in the text. *Id.* Notably, P.J. Federico, the primary author of the Patent Act believed that while Congress did not intend “any radical change in the level of invention,” he thought that “some modification was intended in the direction of moderating the extreme degrees of strictness exhibited by a number of judicial opinions over the past dozen or more years; that is, that some change of attitude more favorable to patents was hoped for.” P.J. Federico, *Commentary on the New Patent Act*, 35 U.S.C.A. § 1 (West 1954), reprinted in 75 J. PAT. & TRADEMARK OFF. SOC’Y 161, 183 (1993).

35. *KSR*, 127 S. Ct. 1739-40.

36. 383 U.S. 39 (1966).

37. *KSR*, 127 S. Ct. at 1740 (citing *United States v. Adams*, 383 U.S. 39, 50-51 (1966)).

38. *Id.* This circumstance is commonly known as “teaching away” from the claimed invention. Where a reference would lead the person of ordinary skill in the art in a technological direction away from the inventor’s ideas or suggests that the inventor’s ideas would not be successful, it is said that the reference “teaches away” from the invention, making the invention nonobvious in light of that reference.

39. 396 U.S. 57 (1969).

40. *KSR*, 127 S. Ct. at 1740 (citing *Anderson’s-Black Rock, Inc. v. Payment Salvage Co.*, 396 U.S. 57, 62-63 (1969)).

function.⁴¹ To summarize, the Court cited to *Sakraida v. AG Pro, Inc.*⁴² to say, “when a patent ‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an arrangement, the combination is obvious.”⁴³ Clearly, the focus of the Court’s review of pertinent cases is the non-patentability of any inventive subject matter that uses only “old” items in their ordinary and accustomed way and that provides nothing unexpected in return. In a sense, since most inventions are fashioned from already-known parts,⁴⁴ the Court appears to be requiring that the whole must be more than the sum of its parts. To use the Court’s own words, “a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.”⁴⁵

The Court also recognized that some cases will be more difficult to analyze than the case presented by KSR and Teleflex, and gave a presumably exemplary, non-limiting list of information that may go into the obviousness analysis.⁴⁶ Among them are “interrelated teachings of multiple patents,” demands present in the marketplace or otherwise known to product designers, and “background knowledge” entailed in the ordinary skill of the given art.⁴⁷ These data points, if relevant, are gathered “in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed” by the inventor.⁴⁸

D. Errors by the Federal Circuit

The Federal Circuit’s principal error, according to the Court, was not in the fashioning of the TSM test itself, which it implied was a “helpful insight” toward identifying legitimate reasons for combining references or elements from references.⁴⁹ Since inventions “rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known,” a showing of why the person of ordinary skill would find it obvious from the prior art to make the claimed combination.⁵⁰ No “necessary inconsistency” exists between the TSM test, which looks to the cited references for the teaching, suggestion, or motivation for their combination or modification, and the obviousness analysis of *Graham* and later cases (as reviewed by the current Court).⁵¹ Rather, according to the Court, the fault lies

41. *Id.* (quoting *Anderson’s-Black Rock, Inc.*, 396 U.S. at 62).

42. 425 U.S. 273 (1976).

43. KSR, 127 S. Ct. at 1740 (citing *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 282 (1976)).

44. *Id.* at 1741.

45. *Id.* at 1740.

46. *Id.*

47. *Id.* at 1740-41.

48. *Id.*

49. *Id.* at 1741.

50. *Id.*

51. *Id.*

in rigid or formalistic application of the TSM test and in the limiting of the obviousness analysis or disregarding of the “diversity of inventive pursuits and of modern technology” in obviousness considerations that may result.⁵²

The opinion addressed three particular manifestations of that principal error, each arising from the Federal Circuit’s narrow interpretation of obviousness.⁵³ The first of these was a holding that a focus of the obviousness question is the problem the inventor sought to solve.⁵⁴ According to the Court, “any need or problem known in the field . . . and addressed by the [inventor’s] patent can provide a reason for combining the elements.”⁵⁵ Thus, consider a case in which the inventor wanted to solve a particular problem by putting together items A and B. Regardless of the inventor’s resolved problem, if it would have been clear to the hypothetical person of ordinary skill in the relevant art that putting together items A and B would solve any known problem, that condition appears sufficient to make an initial case of obviousness.

A second error was found in the Federal Circuit’s “assumption that a person of ordinary skill attempting to solve a problem will be led only to those elements of prior art designed to solve the same problem.”⁵⁶ Instead, the Court relied on “common sense” for a broader view of prior art in the context of obviousness.⁵⁷ Items in a piece of prior art may have certain “primary purposes,” but they may also have other “obvious uses” that can enable the person of ordinary skill to fit together the teachings of multiple references.⁵⁸ In the present case, according to the Court, that the Asano reference’s primary solution was not directed to the inventor’s invention was immaterial.⁵⁹ Asano taught an example of technology (here, an adjustable pedal with a fixed pivot point) that the person of ordinary skill would link together with other art (which taught placing a sensor at a fixed pivot point), and the Court considered that sufficient to lead to obviousness.⁶⁰

The last Federal Circuit error was the incorrect inference drawn from the problem of combating hindsight bias in the obviousness analysis.⁶¹ It has long been axiomatic that the prior art must be looked at from the point of view of the person of ordinary skill without reliance on the inventor’s own work or analysis.⁶² The Court spoke of the “distortion” that such hindsight may cause and being “cautious” about the reasoning drawn from it, but did not come down

52. *Id.*

53. *Id.*

54. *Id.* at 1742 (citing to lower case, *Teleflex, Inc. v. KSR Int’l Co.*, 119 Fed. App’x 282, 288 (Fed. Cir. 2005)).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1742-43.

61. *Id.* at 1742.

62. *Id.* (citing *Graham v. John Deere Co.*, 383 U.S. 1, 36 (1966), for its caution against using the teachings of the inventor against his invention).

entirely against it.⁶³ Rather, it rejected “[r]igid preventative rules that deny factfinders recourse to common sense.”⁶⁴ Apparently, the Court considered the application of the TSM test in this case by the Federal Circuit to have violated common sense, and the legitimate concern for preventing an ex post analysis did not justify it. Notably, the Court indicated that a “broader conception of the TSM test” that considered “common knowledge” and implicit motivations in the prior art may pass muster.⁶⁵

The Court determined that the Federal Circuit’s TSM test as applied in this case was not consistent with the Court’s patent jurisprudence, and the Court essentially reverted to the findings of the district court.⁶⁶ The patent claim at issue in the case was found to be obvious.⁶⁷ The Court led the obviousness analysis from the evidence of desirability of electronic pedals in the marketplace, with references indicating how to do that, through the considerations of the person of ordinary skill as he or she considered those references and others.⁶⁸ Teleflex’s position that the references taught away from their combination, resulting in unobviousness, was rejected, and the Court found no objective or secondary factors indicating unobviousness.⁶⁹

E. Comments

From the Author’s discussions with other patent practitioners, some regard *KSR* as a sea change in the way obviousness is considered, both for federal courts and for the examining corps at the PTO. Others consider the decision as more of a “righting of the ship,” bringing this fundamental question of patentability more in line with practical considerations and basic theory of patent law. While perhaps dicta, the Court’s closing is suggestive of the ideas this opinion is intended to foster:

We build and create by bringing to the tangible and palpable reality around us new works based on instinct, simple logic, ordinary inferences, extraordinary ideas, and sometimes even genius. These advances, once part of our shared knowledge, define a new threshold from which innovation starts once more. And as progress beginning from higher levels of achievement is expected in the normal course, the results of ordinary innovation are not the subject of exclusive rights under the patent laws. Were it otherwise patents might stifle, rather than promote, the progress of useful arts. These premises led to the bar on patents claiming obvious subject matter established in *Hotchkiss* and codified in §103. Application of the bar must not be confined within a

63. *Id.* at 1742-43.

64. *Id.*

65. *Id.* at 1743.

66. *Id.*

67. *Id.*

68. *Id.* at 1744.

69. *Id.* at 1745.

test or formulation too constrained to serve its purpose.⁷⁰

Some may say that this focus on the progress of the useful arts and on the reward for excellence is a reflection of a more subtle change in view intended to move the “factfinders” toward sharper scrutiny of inventions, and they may be correct. However, the phrase “ordinary innovation” and the Court’s rejection of patent protection for it, as well as the concern over stifling progress, suggests to this Author that the Court views patentable subject matter as inventions that are closer toward the “flash of genius” end of the inventive spectrum. As a result, it is likely that either fewer patents will be granted and/or that granted patents will be somewhat narrower in scope (to the extent such comparisons can be meaningfully made within or across technological fields).

This change is already being seen in the examination of patent applications. The PTO has prepared new Examination Guidelines in response to the *KSR* opinion, which were published just outside of the survey period.⁷¹ The Guidelines provide an overview of the *KSR* decision and of the factual obviousness inquiries given in the *Graham* case and reaffirmed in *KSR*.⁷² With those factual findings in hand, the examiner must then determine whether a rationale exists to support an obviousness rejection.⁷³ The Guidelines supply seven different possible rationales for obviousness, as well as an explanation of each in the context of a prior case. Each is discussed briefly below.⁷⁴

(1) “Combining prior art elements according to known methods to yield predictable results.”⁷⁵ Once the *Graham* inquiries are made, a patent claim can be ruled obvious if the prior art shows all of its elements and if further findings are made. These further findings are that (1) the person of ordinary skill could have combined the elements via known methods, with each element merely performing the same function it did when separate from the combination and (2) that the person of ordinary skill would have recognized that the combination’s result(s) were predictable.⁷⁶ This rationale appears to be similar to previous bases for obviousness.

(2) “Simple substitution of one known element for another to obtain predictable results.”⁷⁷ This rationale requires three findings. If the prior art includes subject matter that differs from a patent claim only in the substitution of some components for others, and if those substituted components and their

70. *Id.* at 1746 (citations omitted).

71. Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 in View of the Supreme Court Decision in *KSR International Co. v. Teleflex Inc.*, 72 Fed. Reg. 57,526 (Oct. 10, 2007) [hereinafter Guidelines].

72. *Id.* at 57,526-28.

73. *Id.* at 57,528 (“The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious.”).

74. *Id.* at 57,529.

75. *Id.*

76. *Id.*

77. *Id.* at 57,530.

functions were known in the art, and if the person of ordinary skill could have made the substitution with predictable results, then the rationale is satisfied.⁷⁸ Again, this analytical path is similar to existing ideas of obviousness.

(3) “Use of known technique to improve similar devices (methods, or products) in the same way.”⁷⁹ The examiner must find that the prior art includes a “base” device for which the claimed subject matter is an “improvement.”⁸⁰ If there is something in the prior art that is “comparable” to the base device that is improved in the same way and the person of ordinary skill could have applied that improvement technique to the base device with predictable results, then obviousness can be found.⁸¹ This rationale adds some breadth to the obviousness analysis, insofar as the addition of an item “comparable” to the principal prior art and improvements to that item is a step further away from the evaluation of the claimed subject matter vis-à-vis the prior art.

(4) “Applying a known technique to a known device (method, or product) ready for improvement to yield predictable results.”⁸² The examiner must find that the prior art shows a “base” device for which the claimed subject matter is an “improvement.”⁸³ Then, if there is a technique in the prior art that is “applicable” to the base device to provide predictable results and an improved system, obviousness can be found.⁸⁴ This rationale is closely related to rationale (3), above, with the focus clearly on the principal prior art and its relationship with the claimed subject matter.

(5) “‘Obvious to try’—choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success.”⁸⁵ This rationale requires a finding that there was “a recognized problem or need in the art” (such as a “design need” or “market pressure”).⁸⁶ If there are “a finite number of identified [and] predictable solutions,” and if the person of ordinary skill could have tried them with a reasonable expectation of success, then obviousness can be found.⁸⁷ This is perhaps the most fundamental and broadening change for examination practice at the PTO, since the allegation that a solution was “obvious to try” has not been a proper obviousness criterion under Federal

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 57,531.

83. *Id.*

84. *Id.*

85. *Id.* at 57,532.

86. *Id.*

87. *Id.*

Circuit law for at least twenty years.⁸⁸ Now, however, under *KSR*⁸⁹ and these guidelines, if it would have been obvious to try the patentee's solution, that is sufficient for obviousness.

(6) "Known work in one field of endeavor may prompt variations of it for use in either the same field or a different one based on design incentives or other market forces if the variations would have been predictable to one of ordinary skill in the art."⁹⁰ The prior art must show something "analogous" to the applicant's subject matter, and the examiner must find "design incentives" or "market forces" that would have encouraged changing that prior art item.⁹¹ If, in addition, the examiner finds that the differences between the invention and the prior art were known variations or part of a known principle, and that the person of ordinary skill could make such a predictable variation in light of the noted incentives or forces, then obviousness can be found.⁹² Until *KSR*, art from a different technical field could only be used in an obviousness analysis when it concerned the problem with which the inventor was concerned (the "analogous art" rule).⁹³ This traditional approach, recognizing that even the hypothetical person of ordinary skill in the art could not be charged with knowledge in all fields, appears to be severely weakened, if not eliminated, by *KSR* and these examination guidelines.

(7) "Some teaching, suggestion, or motivation in the prior art that would have led one of ordinary skill to modify the prior art reference or to combine prior art reference teachings to arrive at the claimed invention."⁹⁴ Where the examiner finds a teaching, suggestion, or motivation either in the cited prior art or knowledge generally available in the art to modify or combine reference teachings, as well as a reasonable expectation of success of the modification or combination, a case of obviousness can be made.⁹⁵ This is the pre-*KSR* TSM test, which is familiar to all patent practitioners, and the rigid application of which was struck down by *KSR*. The *KSR* opinion noted that it does not foreclose a flexible or open use of this test.⁹⁶ Its inclusion as one of seven rationales for

88. See 2 DONALD S. CHISUM, CHISUM ON PATENTS § 5.04[1][f][i]-[iv] (1998 & Supp. 2007) (discussing and/or citing inter alia *In re O'Farrell*, 853 F.2d 894 (Fed. Cir. 1988); *In re Yates*, 663 F.2d 1054 (C.C.P.A. 1981); *In re Lindel*, 385 F.2d 453 (C.C.P.A. 1967); *In re Huellmantel*, 324 F.2d 998 (C.C.P.A. 1963).

89. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1742 (2007) (where "a person of ordinary skill has good reason to pursue the known options within his or her technical grasp . . . the anticipated success . . . is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under § 103").

90. Guidelines, 72 Fed. Reg. at 57,533.

91. *Id.*

92. *Id.*

93. See, e.g., *In re Oetiker*, 977 F.2d 1443, 1446 (Fed. Cir. 1992).

94. Guidelines, 72 Fed. Reg. at 57,534.

95. *Id.*

96. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1743 (2007).

obviousness is perhaps the starkest indication that a broad view of obviousness is in the offing in the PTO.

The PTO's examination guidelines also briefly discuss rebuttal of an obviousness determination, focusing on the evidence applicants may offer in this regard.⁹⁷ Notably, this discussion focuses on fact evidence that may rebut the factual findings made by the examiner in the *Graham* factual inquiries and/or in the findings needed to establish an obviousness rationale.⁹⁸ Such evidence may be of "secondary" or "objective" considerations like commercial success or failure of others.⁹⁹ Further, evidence and argument showing that known methods could not achieve the proposed combination, that the combined elements "do not merely perform the function that each element performs separately," or that unexpected results were obtained may also be offered.¹⁰⁰ However,

[a] mere statement or argument that the [PTO] has not established a prima facie case of obviousness or that the [PTO's] reliance on common knowledge is unsupported by documentary evidence will not be considered substantively adequate to rebut the rejection or an effective traverse of the rejection under 37 CFR 1.111(b).¹⁰¹

If this guideline is interpreted simply to mean that the mere allegation of these failures is insufficient, then no substantial change in policy appears indicated.¹⁰² If, on the other hand, it is strictly or severely interpreted, it appears that declaration or other documentary evidence could be required for most responses to obviousness rejections.

KSR and these PTO Guidelines indicate a much broader application of obviousness law to application and patent claims before the PTO and to patent claims before the federal courts. Examiners will continue to rely on their own assessment of common sense and use of a wide field of prior art to attack patent claims. The examiner's job, of course, is to allow those claims of patentable merit, and to reject the others. It is clear that the obviousness hurdle is now significantly higher than it was and that applicants will have substantially more difficult tasks in terms of preparing applications and offering evidence and arguments to the PTO during prosecution.

97. Guidelines, 72 Fed. Reg. at 57,534.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Note that these guidelines may not be in harmony with rules of the PTO that require the examiner to provide documentation for his or her views. *See, e.g.*, 37 C.F.R. § 1.104(d)(2) (2007) (requiring the examiner to provide an affidavit concerning facts or information within his or her own knowledge).

II. WILLFULNESS STANDARDS: *IN RE SEAGATE TECHNOLOGY, LLC*¹⁰³

Another long-time standard of the patent law reviewed and overhauled in 2007 concerns the standards for finding infringement of a patent willful, with the accompanying potential for an award of increased damages and/or attorney fees. The Patent Act permits a court to increase actual damages by a factor of up to three,¹⁰⁴ and although not specified in the statute, the existence of willfulness on the part of the infringer has been held a requirement for invocation of such enhanced damages.¹⁰⁵ Even if willfulness is found, enhanced damages need not be awarded, as the statute uses the permissive “may” concerning them.¹⁰⁶ The Patent Act also permits an award of attorney fees in “exceptional cases,”¹⁰⁷ and such exceptional cases can include situations in which the infringer exhibited willfulness in his or her infringement.

A. *The Underwater Devices Rule*

For almost twenty-five years, the baseline standard for willfulness had been taken from *Underwater Devices Inc. v. Morrison-Knudsen Co.*:¹⁰⁸

“Where . . . a potential infringer has actual notice of another’s patent rights, he has an affirmative duty to exercise due care to determine whether or not he is infringing. Such an affirmative duty includes, *inter alia*, the duty to seek and obtain competent legal advice from counsel *before* the initiation of any possible infringing activity.”¹⁰⁹

The standard requires actual notice on the part of the putative infringer, and charges him or her to take steps to see whether he or she is infringing or may infringe the patent. A requirement to obtain a proper opinion of counsel is included in the duty of care, and for those patents known prior to the beginning of potentially infringing actions, the opinion of counsel was due ahead of such actions.¹¹⁰ Where one became aware of a patent after activity had begun, an opinion should be obtained as soon as possible after the discovery of the patent.¹¹¹ Cases following *Underwater Devices* evolved the rule to view the duty

103. 497 F.3d 1360 (Fed. Cir. 2007) (en banc). The author would like to acknowledge and thank Holiday W. Banta, partner in Woodard, Emhardt, Moriarty, McNett & Henry LLP, for information on this case provided in a meeting of the Firm’s Litigation Practice Group.

104. 35 U.S.C. § 284 (2000).

105. *Seagate Tech.*, 497 F.3d at 1368 (citing *Beatrice Foods Co. v. New England Printing & Lithographing Co.*, 923 F.2d 1576, 1578 (Fed. Cir. 1991)).

106. *Id.* (citing 35 U.S.C. § 284 (2000); *Odetics, Inc. v. Storage Tech. Co.*, 185 F.3d 1259, 1274 (Fed. Cir. 1999); *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570 (Fed. Cir. 1996)).

107. 35 U.S.C. § 285 (2000).

108. 717 F.2d 1380 (Fed. Cir. 1983), *overruled by Seagate Tech.*, 497 F.3d 1360.

109. *Seagate Tech.*, 497 F.3d at 1368-69 (omission in original) (quoting *Underwater Devices, Inc.*, 717 F.2d at 1389-90 (citations omitted)).

110. *Id.* at 1369.

111. *Id.*

under the “totality of the circumstances” and “enumerated factors informing the inquiry.”¹¹²

B. Case Background and History

Before being sued for infringement of two patents, defendant Seagate Technology had sought an opinion of counsel concerning those patents.¹¹³ The opinion, received shortly after the complaint in the case had been filed, determined that many of the patent claims were invalid and that others were not infringed by Seagate’s products.¹¹⁴ Additional opinions were also obtained later on other issues.¹¹⁵ After Seagate notified the plaintiffs that it intended to rely on the opinions to defend against a finding of willfulness and permitted discovery of its attorney and his documents relating to the opinions, the plaintiffs moved to compel production of communications and work product of Seagate’s trial and other counsel.¹¹⁶ The trial court ruled that a broad waiver of privilege and work product immunity had taken place and ordered disclosure.¹¹⁷ Following plaintiffs’ request for trial counsel opinions and notices of deposition of trial counsel, and a denial of Seagate’s motions for stay and for certification of an interlocutory appeal, Seagate petitioned for mandamus to the Federal Circuit.¹¹⁸

Recognizing the “practical dilemmas” arising between the desire for protection from willfulness determinations and the potential for waiver of privilege, the Federal Circuit granted the petition.¹¹⁹ It traced its consideration of those dilemmas through several cases. The court had recommended *in camera* review of opinions and related privileged materials and bifurcated trials to employ the right balance between willfulness and privilege.¹²⁰ More recently, the court moved further in favor of protecting the attorney-client relationship by refusing to give an adverse inference as to the substance of an opinion of counsel if the defendant asserted attorney-client or work product privilege.¹²¹ Following that holding, the court determined that while reliance on in-house counsel’s opinion waives attorney-client privilege, as well as work product protection for communications on that same subject matter, the waiver “did not extend to work product that was not communicated to an accused infringer.”¹²² With that

112. *Id.* (citing *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826 (Fed. Cir. 1992); *Rolls-Royce Ltd. v. GTE Valetton Corp.*, 800 F.2d 1101, 1110 (Fed. Cir. 1986)).

113. *Id.* at 1366.

114. *Id.*

115. *Id.*

116. *Id.* at 1366-67.

117. *Id.* at 1367.

118. *Id.*

119. *Id.*

120. *Id.* at 1369 (citing *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 643 (Fed. Cir. 1991)).

121. *Id.* at 1369-70 (citing *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1344-45 (Fed. Cir. 2004) (en banc)).

122. *Id.* at 1370 (citing *In re Echostar Commc’ns Corp.*, 448 F.3d 1294, 1303-04 (Fed. Cir.

background in hand, the Federal Circuit turned to the question at hand, namely whether any “waiver resulting from advice of counsel and work product defenses extend to trial counsel.”¹²³

C. *The Underwater Devices Rule is Overruled*

After reviewing briefly the nature of the term “willful,” the court declared that the *Underwater Devices* duty of care set a level for willful infringement that was too low.¹²⁴ Rather than using the recklessness threshold found in other areas of law, the court considered the existing patent law rule to be more akin to a negligence standard and “allow[ed] for punitive damages in a manner inconsistent with Supreme Court precedent.”¹²⁵ Even though the appeal issues were discovery-based, the court saw that the willfulness standard clearly affects what evidence is relevant and likewise the appropriate range for discovery.¹²⁶

Consequently, the court took the opportunity to rework rules and analytical considerations surrounding willfulness and opinion-of-counsel defenses, and concentrated heavily on objectivity in doing so. Derived from definitions in other areas of the law, the focus for willfulness in the patent law now is “at least a showing of objective recklessness.”¹²⁷ In explaining its holding further, the court stated that a successful claim of willful infringement requires a “show[ing] by clear and convincing evidence that the infringer acted despite an *objectively high likelihood* that its actions constituted infringement of a valid patent.”¹²⁸ Apparently to underscore the two-fold use of “objectiveness,” the court further noted that the putative infringer’s state of mind is irrelevant to the assessment of risk of infringement.¹²⁹ Once such an objective likelihood is established, the patentee must then demonstrate a mental element on the infringer’s part.¹³⁰ The objective risk must be “either known or so obvious that it should have been known to the accused infringer.”¹³¹

However, this is where the court’s guidance on the topic of willfulness ends, at least for the present. Having appropriately explained the jump from the petition for mandamus on a question of discovery to the fundamental questions involved in a determination of willfulness, and having offered a two-step test for willfulness, the court stopped. Rather than offer further teaching or examples, perhaps from past opinions, the judges preferred to allow “future cases to further

2006)).

123. *Id.*

124. *Id.* at 1371.

125. *Id.* (citing *Safeco Ins. Co. v. Geico Gen. Ins. Co.*, 127 S. Ct. 2201, 2209, 2214-15, 2216 n.20 (2007); *Smith v. Wade*, 461 U.S. 30, 39-49 (1983)).

126. *Id.* at 1371-72.

127. *Id.* at 1371.

128. *Id.* (emphasis added) (citing *Safeco Ins. Co.*, 127 S. Ct. at 2215).

129. *Id.*

130. *Id.*

131. *Id.*

develop the application” of the new test.¹³² Nevertheless, an oblique expectation that “standards of commerce would be among the factors a court might consider” found its way into the opinion.¹³³ The court did not offer particular solutions for the case at bar, with its disposition being a grant of mandamus and remand to the district court for reconsideration of the discovery issues that fomented the petition.¹³⁴

The second facet of the *Seagate* opinion was the question of the scope of waiver of privilege when an opinion-of-counsel defense is asserted.¹³⁵ This point, clearly centrally related to the parties’ conflict at the district court level, was split into separate considerations of the attorney-client privilege¹³⁶ and work product protection.¹³⁷ In both cases, the result is that an opinion-of-counsel defense generally does not work a waiver of these valuable protections.¹³⁸

Taking the issue of attorney-client privilege first, the court expressed its veneration for the privilege and its value in the legal system.¹³⁹ Recognizing the general principle that where a client waives the privilege, protection is lost for “all other communications relating to the same subject matter,”¹⁴⁰ the court also noted the lack of any bright line test for the scope of waiver and that the facts and circumstances of the particular case before establishing that scope.¹⁴¹ With district court decisions espousing three different general positions—waiver based on opinion-of-counsel defense extends to trial counsel, waiver does not so extend, and a “middle ground” applying only to certain communications—this appellate decision chose the first position.¹⁴² “[T]he significantly different functions of trial counsel and opinion counsel advise against extending waiver to trial counsel.”¹⁴³ These functions, viewed as objective assessment from opinion counsel versus adversarial litigation strategy and presentation from trial counsel,¹⁴⁴ plus the long-standing “compelling” interests contrary to waiver of privilege for trial counsel¹⁴⁵ and the focus of the willfulness inquiry on conduct prior to litigation,¹⁴⁶ led to the decision. The court did not make that rule an absolute imperative, giving lower courts discretion “in unique circumstances to extend waiver to trial counsel, such as if a party or counsel engages in

132. *Id.*

133. *Id.* at 1371 n.5.

134. *Id.* at 1376.

135. *Id.* at 1375.

136. *See id.* at 1372-75.

137. *See id.* at 1375-76.

138. *Id.*

139. *Id.* at 1372.

140. *Id.* (citing *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed. Cir. 2005)).

141. *Id.*

142. *Id.* at 1373.

143. *Id.*

144. *Id.*

145. *Id.* (citing *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)).

146. *Id.*

chicanery.”¹⁴⁷

This section of the opinion also included an interesting passage that should give patent plaintiffs food for thought as they consider whether to request a preliminary injunction. A preliminary injunction is avoided through a showing of “only a substantial question as to invalidity” or infringement.¹⁴⁸ Correlating that principle with the objective recklessness threshold for willfulness pronounced earlier in the opinion, the court noted that where a defendant has shown that substantial question on invalidity or infringement, such a showing is likely to avoid a willfulness finding based on the defendant’s conduct after the filing of the complaint.¹⁴⁹ Where previously the denial of a preliminary injunction was a setback but not fatal to any portion of a plaintiff’s case, now such a denial likely results in the denial of willfulness and the chance to obtain enhanced damages for any post-complaint infringing conduct.¹⁵⁰ That “substantial question” as to invalidity or infringement is likely, in the court’s view, to show objectively the defendant’s conduct during litigation to be non-reckless.¹⁵¹

Similarly, the waiver occasioned by the opinion-of-counsel defense is generally not extendable to trial counsel’s work product “absent exceptional circumstances.”¹⁵² Again recognizing the fundamental place of the work product doctrine in an adversarial system and prior opinions concerning scope of waiver, the court held that while opinion counsel’s work product was available for discovery, trial counsel’s was not.¹⁵³ The possibility of extending the waiver for special problem cases was left open, and the court also acknowledged existing principles allowing discovery of work product on a proper showing of need and hardship.¹⁵⁴

Seagate would appear to make it significantly more difficult to prove willfulness and obtain enhanced damages. On paper, at least, the Federal Circuit has characterized the *Underwater Devices* rule as approving a willfulness standard akin to negligence, and has moved that standard to objective recklessness as a minimum for finding willfulness.¹⁵⁵ On that basis alone it would seem likely that lower courts and the Federal Circuit will scrutinize allegations of willfulness much more carefully and that they would reject more of those allegations than has occurred in the past. Combined with the holding in *Knorr-Bremse* that the failure to produce an opinion of counsel, or failure to obtain legal advice, will not provide an adverse inference as to the contents of the

147. *Id.* at 1374-75.

148. *Id.* at 1374 (citing *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1359 (Fed. Cir. 2001)).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1375.

153. *Id.* at 1375-76.

154. *Id.* at 1376.

155. *Id.* at 1368-73.

opinion or to willfulness,¹⁵⁶ the party asserting willfulness has a heavier burden in proving its case than was true just a few years ago. Plaintiffs will undoubtedly wish to be even more careful in alleging willfulness in their complaints given these new standards. These changes are focused on preserving the rules surrounding the attorney-client relationship that have been developed over time and are used in every other area of the law¹⁵⁷ and appropriately shift burdens concerning willfulness from the defendant to the plaintiff.

III. UPDATE ON *eBAY INC. V. MERCExchange, L.L.C.*¹⁵⁸

The District Court for the Eastern District of Virginia issued a new ruling in this case following remand from the Supreme Court.¹⁵⁹ The history of this case includes a jury verdict of willful infringement by defendants eBay and Half.com, following which the trial court denied a motion for a permanent injunction.¹⁶⁰ Among the Federal Circuit's decisions on appeal was a reversal of that denial with an indication "that injunctions should essentially issue as a matter of course in patent infringement actions upon a finding of validity and infringement."¹⁶¹ The Supreme Court granted certiorari solely on the issue of the permanent injunction standard and vacated the Federal Circuit's ruling.¹⁶² In a sense, the Court's *eBay* ruling is a precursor to the *KSR* ruling discussed above insofar as it demonstrates a current relative high interest in patent matters and a desire to correct what it views as the Federal Circuit's deviation from established principles in its efforts to create uniformity in the patent law. The Court relied on its earlier decisions on injunctions generally and on injunction issues found in its copyright decisions,¹⁶³ and held that the familiar four-factor test relating to injunctions must be used in patent cases¹⁶⁴ and that injunctions cannot be allowed to issue simply as a matter of course.¹⁶⁵

With this direction in mind, the district court revisited the injunction question.¹⁶⁶ After reviewing post-remand proceedings and post-trial factual

156. *Id.* at 1369-70 (citing *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1344-45 (Fed. Cir. 2004) (en banc)).

157. Note *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-92 (2006), which similarly found that tests available in other areas of law (e.g. the four-factor test employed in equity in a determination of whether to grant a permanent injunction) applied to patent cases. It would seem likely that other situations in which practice in patent litigation varies from practice in other litigation may be likewise harmonized by the Supreme Court or Federal Circuit in the future.

158. 547 U.S. 388.

159. *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556 (E.D. Va. 2007).

160. *Id.* at 559-61.

161. *Id.* at 559-60.

162. *Id.* at 560.

163. *eBay, Inc.*, 547 U.S. at 390.

164. *Id.* at 391-92.

165. *Id.* at 394.

166. *MercExchange, L.L.C.*, 500 F. Supp. 2d at 568.

developments,¹⁶⁷ and considering a motion for a stay based on proceedings in the PTO,¹⁶⁸ the court turned to MercExchange's renewed injunction request. In reviewing whether the plaintiff had shown an irreparable injury, the court ran into an immediate hurdle—whether the oft-cited presumption of irreparable harm arising from infringement of a valid patent survived the Supreme Court's holding.¹⁶⁹ From the import of the Supreme Court's language as well as other cases it found relevant, this court came down against the presumption of irreparable harm.¹⁷⁰ Nonetheless, it also recognized that “the nature of the right protected by a patent, the right to exclude, will frequently result in a plaintiff successfully establishing irreparable harm” following validity and infringement findings.¹⁷¹ Even so, it remains the plaintiff's responsibility to affirmatively prove that irreparable harm exists, given that “numerous case specific facts may weigh against the issuance of an injunction.”¹⁷²

The district court then considered each of the traditional four factors.¹⁷³ It first determined that MercExchange had not established irreparable harm.¹⁷⁴ The thorough discussion of that factor covered a range of facts concerning the parties and their business activities, but the ultimate conclusion centered for the most part on MercExchange's willingness to license the patents at issue and its own lack of commercial activity in practicing them.¹⁷⁵ While not preventing it from obtaining an injunction, MercExchange's efforts were viewed as evidencing a policy of maximizing revenue from the patents by having others practice them, and an award of substantial damages is compatible with that policy.¹⁷⁶ The practicality and suitability of money damages in this case indicated that the harm to the plaintiff was not irreparable.¹⁷⁷

The court also considered and rejected four issues or “sub-factors” that might be relevant to an irreparable harm analysis.¹⁷⁸ The first was a potential distinction that might in a sense excuse MercExchange's licensing program and permit the inference of irreparable harm.¹⁷⁹ It recognized the fact that an individual inventor may seek to license a patent as an alternative to raising

167. *Id.* at 559-62.

168. *Id.* at 562-67.

169. *Id.*

170. *Id.* at 568-69 (citing *24 Techs., Inc. v. Microsoft Corp.*, 434 F. Supp. 437, 440 (E.D. Tex. 2006); *Paice LLC v. Toyota Motor Corp.*, No. 2:04-CV-211-DF, 2006 WL 2385139, at *4 (E.D. Tex. Aug. 16, 2006)).

171. *Id.* at 569.

172. *Id.*

173. *Id.* at 569-90.

174. *Id.* at 569-70.

175. *Id.* at 569-71.

176. *Id.* at 569-70.

177. *Id.* at 571.

178. *Id.* at 571-75.

179. *Id.* at 571-72.

capital to develop the subject matter himself or herself.¹⁸⁰ That scenario is distinguishable, the court found, because the individual inventor is still seeking to develop the patented item, while MercExchange sought to license to companies already in the market and potentially infringing its patents.¹⁸¹

Second, as opposed to patent owners “who do not practice their patents but nonetheless seek to defend their *right to exclude*, MercExchange’s public and private actions indicate its desire to obtain royalties from eBay.”¹⁸² The record showed published statements by a MercExchange officer and its attorney suggesting that eBay should be allowed to use the patents on a royalty-bearing arrangement, as well as private efforts between the parties to enter a license before litigation began.¹⁸³ In the court’s view, these facts in light of prior case law weighed against irreparable harm as an indication of “the patent holder’s willingness to forgo his right to exclude.”¹⁸⁴

The third issue the court noted was MercExchange’s lack of an attempt to obtain a preliminary injunction.¹⁸⁵ It opined that there are many considerations that may go into a decision to seek or not to seek a preliminary injunction and that preliminary and permanent injunctions have fundamental differences.¹⁸⁶ Even so, the court believed that the decision not to seek a preliminary injunction weighed against irreparable harm at least because it was consistent with the other facts of record—such as its licensing efforts with defendant eBay and the reduction in available royalties had an injunction been issued—that indicated its “true goal” was not to defend its right to exclude.¹⁸⁷ Had it wanted to defend that right, the court thought MercExchange “would likely have at least *attempted* to stop eBay, the purported ‘market monopolist,’ from further improving its foothold on the market” as litigation continued.¹⁸⁸

Fourth, the court considered the nature of the business-method subject matter of the patent at issue, which “appears to rely upon a unique combination of non-unique elements.”¹⁸⁹ It agreed that the patent was valid and enforceable at that time and that such patents would support an injunction just as much as any other.¹⁹⁰ However, it also observed the need for caution in granting such patents, as expressed in Supreme Court cases such as *KSR International Co. v. Teleflex Inc.* and the opinion remanding this case back to the district court, as well as the multiple rejections of the claims by the PTO.¹⁹¹ In that light, the court suggested

180. *Id.*

181. *Id.* at 572.

182. *Id.*

183. *Id.*

184. *Id.* at 573.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 574.

190. *Id.*

191. *Id.* at 574-75 (citing *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1739 (2007)).

that the nature of the patent weighed “against a finding of irreparable harm as if [it] was improvidently granted.”¹⁹²

While these four “sub-factors” weighed against a finding of irreparable harm, the court saw facts surrounding MercExchange’s relationship with another licensor as having the potential to be “significant evidence” favoring irreparable harm.¹⁹³ Those facts, discussed in some detail, did not provide evidence of harm because they pointed to MercExchange’s desire for revenue through licensing, rather than assisting itself or another to exclude others from the market.¹⁹⁴ The court likewise considered additional arguments from MercExchange offered from new and previously obtained evidence and found that they either were not indicators of irreparable harm and/or did not overcome the considerations against irreparable harm.¹⁹⁵ It ultimately found that the irreparable harm factor did not support the entry of a permanent injunction.¹⁹⁶

The second injunction factor, whether there is an adequate remedy at law, overlaps the analysis of whether irreparable harm exists. The court summarized its points from its irreparable harm analysis and determined that money damages would adequately compensate MercExchange in light of its licensing and litigation policies.¹⁹⁷ This determination of the second factor also weighed against an injunction.¹⁹⁸

The court further considered the final two factors, the balance of the hardships between the parties¹⁹⁹ and the public interest.²⁰⁰ The former favored neither party, according to the court, after a review of the relevant information of record.²⁰¹ As to the latter, the court found that the public interest slightly weighed against an injunction.²⁰² It started from the premise that the public interest in maintaining a strong patent system may favor the patentee, but it also considered “the type of patent involved, the impact on the market, the impact on the patent system, and any other factor that may impact the public at large.”²⁰³

192. *Id.* at 575. Since 35 U.S.C. § 282 (2000) unequivocally provides the presumption of validity of a patent, and the patent survived the underlying litigation in the *MercExchange* case, it might appear that the court’s recital of “improvidently granted” as a factor against irreparable harm is not supportable. However, the record indicated that the patent at issue was not only under reexamination by the PTO, but also that the claims had been initially rejected. *Id.* at 574. That fact apparently allowed the court to get past the validity presumption and/or any case law on validity that existed.

193. *Id.* at 575.

194. *Id.* at 575-76.

195. *Id.* at 575-80.

196. *Id.* at 580-81.

197. *Id.* at 582-83.

198. *Id.* at 583.

199. *Id.* at 583-86.

200. *Id.* at 586-90.

201. *Id.* at 585-86.

202. *Id.* at 586.

203. *Id.*

Among its discussion of these factors, the court came back to (and seemed to emphasize) MercExchange's litigation position and public statements in apparent disregard or minimization of its right to exclude, finding that the "public interest would be disserved" by allowing MercExchange to assert an alternative reality to the court following trial.²⁰⁴ With three factors pointing away from a permanent injunction, the court refused to enter one.²⁰⁵

Certainly any permanent injunction analysis will necessarily be focused on the particular facts of a given case, and so the value of any such analysis in one opinion in predicting the outcome of or persuading a court in a later case may be small or negligible. The *MercExchange* court went out of its way to express that its analysis is dependent on its facts and does not represent the use of any presumptions or bright line rules.²⁰⁶ Nevertheless, the variety of issues the court considered and the way it considered them are quite instructive. It is possible of course that further appeals in this case may affect the merit of the analytical framework in this opinion. For now, and perhaps for some time to come, the decision provides substantial guidance as to how to consider a permanent injunction request. It also provides clear clues for counsel and for businesspeople as to what conduct should be avoided if a patent's inherent right to exclude is to be preserved.

IV. INDIANA'S RIGHT OF PUBLICITY—*SHAW FAMILY ARCHIVES*

Indiana's right of publicity statute²⁰⁷ has enjoyed a certain amount of fanfare centering around its comparatively broad protections and its one-hundred-year term of protection,²⁰⁸ the longest of any United States jurisdiction. However, in the relatively few years since its enactment, the statute has been the subject of very few reported cases. A 2007 opinion from the United States District Court for the Southern District of New York has opened up the possibility that the statute is not as far-reaching as has been thought.

In *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*,²⁰⁹ the court considered not only Indiana's right of publicity statute, but also the laws of New York and California, and how they affected photographs of Marilyn Monroe. In 2005, Indianapolis-based CMG Worldwide ("CMG") along with Marilyn Monroe, LLC filed suit against Shaw Family Archives ("SFA") and others in federal court in Indianapolis, alleging a violation of Monroe's right of publicity under Indiana law.²¹⁰ Before being served, SFA filed an action with several claims, including a request for a declaratory judgment as to whether any post-

204. *Id.* at 586-90.

205. *Id.* at 591.

206. *See, e.g., id.* at 569 (stating that "a permanent injunction shall only issue if . . . the case specific facts warrant entry of an injunction").

207. IND. CODE §§ 32-36-1-1 to -20 (2004).

208. *Id.* § 32-36-1-8.

209. 486 F. Supp. 2d 309 (S.D.N.Y. 2007).

210. *Id.* at 310.

mortem right of publicity existed in Monroe's name, likeness, or image.²¹¹ Following motions in each court, the cases were consolidated in the New York federal court, which ruled that Indiana's choice of law principles would be used in the case.²¹²

This opinion dealt with the parties' cross-motions for summary judgment focused on the application of Indiana's right of publicity law.²¹³ As factual background, the court noted that Monroe's will included a residuary clause that bequeathed to Lee Strasberg "the entire remaining balance" of the estate.²¹⁴ Eventually Marilyn Monroe, LLC was formed "to hold and manage the intellectual property assets of the residuary beneficiaries of Monroe's will."²¹⁵ As to SFA, it is a company that owns photographs by the late Sam Shaw, among which are "many 'canonical' Marilyn images."²¹⁶ The complaint alleged that SFA had been selling shirts with Monroe's picture and had maintained a website through which licenses to use pictures or images of Monroe on products could be purchased.²¹⁷ It further alleged that Marilyn Monroe, LLC is the proper successor-in-interest to Monroe's rights of publicity, which it claimed were passed through Monroe's will to Strasberg and on to the company.²¹⁸ SFA's actions were alleged to violate Indiana law, a "statute[] passed over three decades after Ms. Monroe's death, by a state with which she had (as far as the court is aware) absolutely no contact during her life."²¹⁹

While the opinion deals in the main with aspects of probate law, insofar as the Monroe will was the vehicle through which the right of publicity passed (if at all),²²⁰ it also makes some fundamental determinations about the reach of the Indiana statutory provisions.²²¹ After stating the principle that one cannot devise by will property he or she did not own at the time of death, the court found that "[d]escendible postmortem publicity rights were not recognized, in New York, California, or Indiana at the time of Ms. Monroe's death."²²² Focusing on Indiana law, the court opined that until passage of the right of publicity statute, the only way rights of publicity could be asserted was via a "personal tort action for invasion of privacy."²²³ The result is that "any publicity rights she enjoyed

211. *Id.* at 310-11.

212. *Id.* at 311.

213. *Id.* at 312-13.

214. *Id.* at 312.

215. *Id.*

216. *Id.* at 312-13.

217. *Id.* at 313.

218. *Id.*

219. *Id.*

220. *Id.* at 314-19.

221. *Id.* at 319-20.

222. *Id.* at 314.

223. *Id.* (citing IND. CODE § 34-9-3-1 (2004); *Time Inc. v. Sand Creek Partners, L.P.*, 825 F. Supp. 210, 212 (S.D. Ind. 1993); *Cont'l Optic Co. v. Reed*, 86 N.E.2d 306, 309 (Ind. App. 1949)). Note that commentators generally find the origin of right of publicity law in right of privacy law,

. . . were extinguished at her death by operation of law.”²²⁴

The court dismissed the argument by Marilyn Monroe, LLC that her will could pass postmortem publicity rights later conferred on her by statute.²²⁵ As previously noted, the court discussed at length the New York and California probate law and their insistence that a will cannot pass property not owned by the decedent at the time of death.²²⁶ The argument that the contrary intent of the decedent can change that rule was quickly dispatched, as was the argument that other provisions of New York’s or California’s probate law could support its case.²²⁷ A further argument based on Texas law, that a residuary clause can pass property the decedent may have “overlooked,” was not persuasive because it was out of jurisdiction, because “Monroe could not have overlooked a right that did not come into being” until many years after she died, and because it affirmed the principle that property owned by the decedent is all that can be devised by will.²²⁸

The last point made by the court focuses on the Indiana statute and interprets it as not permitting transfer of rights of publicity of persons already deceased at the time it was enacted.²²⁹ It pointed to sections 16 to 18 of the statute, which provide several ways including “testamentary document” for transferring rights of publicity and provide that such rights pass under the rules of intestate succession if not transferred in one of those ways.²³⁰ In the court’s words, “even if a postmortem right of publicity . . . could have been created after [Monroe’s] death,” the Indiana statute does not permit it “to be transferred through the will of a ‘personality’ who . . . was already deceased at the time of the statute’s enactment.”²³¹ If such postmortem rights are available, they clearly were not passed by any of the methods listed in the Indiana statute and thus must have passed to heirs via intestate succession.²³² The court did not discuss who that might be, but it may be supposed that there were no such heirs, and it is certainly the case that neither CMG nor Marilyn Monroe, LLC had a claim to such rights through any such heirs that might exist.

Once again, the great majority of this case is concerned with interpretations of the will under appropriate law. Nonetheless, two important points can be drawn from this opinion. First, at least one federal court at least implicitly has held that Indiana’s right of publicity statutes does not create rights *nunc pro tunc*, as though they came into existence prior to a personality’s death.²³³ Applied to the facts of this case, the rights created with the 1994 enactment of those statutes

but that early common law right of publicity is quite a different species from later statutory rights.

224. *Id.*

225. *Id.*

226. *Id.* at 314-17.

227. *Id.* at 314-15.

228. *Id.* at 316-17.

229. *Id.* at 318-19.

230. *Id.* at 319 (citing IND. CODE §§ 32-36-1-16 to -18 (2004)).

231. *Id.*

232. *Id.*

233. *Id.*

do not act retroactively to create rights in 1962, just before Monroe's death.²³⁴ The second is the holding that any rights of publicity under Indiana law for personalities who died before 1994 cannot be passed by will.²³⁵ Taken together, this court would seem to mean that there are no rights of publicity under Indiana law for personalities who are deceased earlier than 1994. If rights are not retroactively created and whatever might exist cannot be devised, there seems to be little or no room to find rights for such predeceased people. Of course, it may be that Indiana courts or those of other states will have a different view. However, in the opinion of this Author, *Shaw Family Archives* is well-reasoned and persuasive, and makes a substantial rebuttal to those who consider Indiana's right of publicity statute to be far-reaching, perhaps to be able to encompass personalities who passed away early in the twentieth century, such as Mark Twain.

234. *Id.*

235. *Id.* at 319-20.

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

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INTRODUCTION

The 2007 survey period¹ continued to produce decisions that help Indiana practitioners and judges interpret the Indiana Product Liability Act (“IPLA”).² This Survey does not attempt to address in detail all of the cases decided during the survey period.³ Rather, it examines selected cases that address important,

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1. The survey period is October 1, 2006, to September 30, 2007. This Article also addresses a few developments that occurred after September 30, 2007.

2. This Article follows the lead of the Indiana General Assembly and employs the term “product liability” (not “products liability”) when referring to actions governed by the IPLA.

3. Courts issued several important opinions in cases in which the theory of recovery was related to or in some way based upon “product liability” principles, but the appellate issue did not involve a question implicating substantive Indiana product liability law. Those decisions are not addressed in detail here because of space constraints, even though they may be interesting to Indiana product liability practitioners. *See Price v. Wyeth Holdings Corp.*, 505 F.3d 624 (7th Cir. 2007) (addressing several procedural issues including reinstatement of claims after voluntary dismissal, default judgment, and removal to federal court); *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904-05 (7th Cir. 2007) (addressing the evidentiary standard for exclusion of expert testimony under *Daubert v. Merrell Dow Pharm., Inc.* and Federal Rule of Evidence 702); *Sims v. EGA Prods., Inc.*, 475 F.3d 865, 867-68 (7th Cir. 2007) (determining that damages which are disproportionate to the defendant’s wrong constitutes good cause to set aside default judgment); *Pribble v. Siegwirk USA, Inc.*, No. 1:06-cv-1120-SEB-JMS, 2007 U.S. Dist. LEXIS 24368, at *7-11 (S.D. Ind. Mar. 28, 2007) (addressing issues related to removal to federal court); *Klein v. Depuy, Inc.*, 476 F. Supp. 2d 1007, 1011-15 (N.D. Ind.), *aff’d*, 506 F.3d 553 (7th Cir. 2007) (applying North Carolina substantive law after determining Indiana substantive law did not apply); *In re Bridgestone/Firestone, Inc.*, No. IP04-S819C-B/S, 2007 U.S. Dist. LEXIS 9378, at *4 (S.D. Ind. Jan. 4, 2007) (reinstating motion to dismiss on grounds of *forum non conveniens*); *Large v. Mobile Tool, Int’l, Inc.*, No. 1:02cv177, 2006 U.S. Dist. LEXIS 90961, at *23-26 (N.D. Ind. Dec. 15, 2006) (determining that summary judgment on the issue of indemnification was not proper as there was conflicting evidence as to whether indemnification provision in an asset purchase agreement was

substantive product liability issues. This Survey also provides some background information, context, and commentary when appropriate.

I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978.⁴ It originally governed claims in tort utilizing both negligence and strict liability theories. In 1983, the General Assembly amended it to apply only to strict liability actions.⁵ In 1995, the General Assembly amended the IPLA to once again encompass theories of recovery based upon both strict liability and negligence.⁶

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.⁷ The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of statutes governing civil practice.

The IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by users or consumers against manufacturers or sellers for physical harm caused by a product, "regardless of the substantive legal theory or theories upon which the action is brought."⁸ When Indiana Code sections 34-20-1-1 and -2-1 are read together, there are five unmistakable threshold requirements for IPLA liability: (1) a claimant who is a user or consumer and is also "in the class of persons that the seller should reasonably foresee as being subject to the harm caused";⁹ (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";¹⁰ (3) "physical harm caused by a product";¹¹ (4) a product that is "in a defective condition unreasonably

clear and unambiguous); *Azar v. Merck & Co.*, No. 3:06-cv-0579 AS, 2006 U.S. Dist. LEXIS 78655, at *4-5 (N.D. Ind. Oct. 27, 2006) (granting motion to stay pending transfer to multidistrict litigation in federal court); *Dorman v. Osmose, Inc.*, 873 N.E.2d 1102, 1106-10 (Ind. Ct. App. 2007) (focusing on juror replacement and evidentiary admissions).

4. Act of Mar. 10, 1978, No. 141, § 28, 1978 Ind. Acts 1308, 1308-10.

5. Act of Apr. 21, 1983, No. 297, 1983 Ind. Acts 1814.

6. Act of Apr. 26, 1995, No. 278, §§ 1-7, 1995 Ind. Acts 4051, 4051-56. See *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

7. Act of Mar. 6, 1998, 1998 Ind. Acts 1. The current version of the IPLA is found in Indiana Code sections 34-20-1-1 to -9-1.

8. IND. CODE § 34-20-1-1 (2004).

9. Indiana Code section 34-20-1-1 identifies a proper IPLA claimant as a "user" or "consumer." Indiana Code section 34-20-2-1(1) requires that IPLA claimants be in the "class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition."

10. Indiana Code section 34-20-1-1(2) identifies proper IPLA defendants as "manufacturers" or "sellers." Indiana Code section 34-20-2-1(2) provides the additional requirement that such a manufacturer or seller also be "engaged in the business of selling the product," effectively excluding corner lemonade stand operators and garage sale sponsors from IPLA liability.

11. IND. CODE § 34-20-1-1(3) (2004).

dangerous to [a] user or consumer” or to his property;¹² and (5) a product that “reach[ed] the user or consumer without substantial alteration in [its] condition.”¹³ Indiana Code section 34-20-1-1 makes clear that the IPLA governs and controls all claims that satisfy these five requirements, “regardless of the substantive legal theory or theories upon which the action is brought.”¹⁴

A. “User” or “Consumer”

The language the General Assembly employs in the IPLA is very important when determining who qualifies as IPLA claimants. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by “users” and “consumers.”¹⁵ For purposes of the IPLA, “consumer” means:

- (1) a purchaser;
- (2) any individual who uses or consumes the product;
- (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or
- (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.¹⁶

“User” has the same meaning as “consumer.”¹⁷ Several published decisions in

12. *Id.* § 34-20-2-1.

13. *Id.* § 34-20-2-1(3). Indiana Pattern Jury Instruction 7.03 sets out a plaintiff’s burden of proof in a product liability action. It requires a plaintiff to “prove each of the following propositions by a preponderance of the evidence”:

1. The defendant was a manufacturer of the product [or the part of the product] alleged to be defective and was in the business of selling the product;
2. The defendant sold, leased, or otherwise put the product into the stream of commerce;
3. The plaintiff was a user or consumer of the product;
4. The product was in a defective condition unreasonably dangerous to users or consumers (or to user’s or consumer’s property);
5. The plaintiff was in a class of persons the defendant should reasonably have foreseen as being subject to the harm caused by the defective condition;
6. The product was expected to and did reach the plaintiff without substantial alteration of the condition in which the defendant sold the product;
7. The plaintiff or the plaintiff’s property was physically harmed; and
8. The product was a proximate cause of the physical harm to the plaintiff or the plaintiff’s property.

IND. PATTERN JURY INSTRUCTIONS—CIVIL § 7.03 (2005).

14. IND. CODE § 34-20-1-1 (2004).

15. *Id.*

16. *Id.* § 34-6-2-29.

17. *Id.* § 34-6-2-147.

recent years construe the statutory definitions of “user” and “consumer.”¹⁸

A literal reading of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined “user” or “consumer,” he or she also must satisfy another statutorily-defined threshold before proceeding with a claim under the IPLA. That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the “user” or “consumer” also be “in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.”¹⁹ Thus, the plain language of the statute assumes that a person or entity must already qualify as a “user” or a “consumer” *before* a separate “reasonable foreseeability” analysis is undertaken. In that regard, the IPLA does not appear to provide a remedy to a claimant whom a seller might reasonably foresee as being subject to the harm caused by a product’s defective condition if that claimant falls outside of the IPLA’s definition of “user” or “consumer.”

There were no significant published decisions during the survey period that interpreted the terms “user” or “consumer.”²⁰

18. See *Butler v. City of Peru*, 733 N.E.2d 912, 919 (Ind. 2000) (mentioning that a maintenance worker could be considered a “user or consumer” of an electrical transmission system because his employer was the ultimate user and he was an employee of the “consuming entity”); *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 279 (Ind. 1999) (holding that a “user or consumer” includes a distributor who uses the product extensively for demonstration purposes). For a more detailed analysis of *Butler*, see Joseph R. Alberts & David M. Henn, *Survey of Recent Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 870-72 (2001). For a more detailed analysis of *Estate of Shebel*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1333-36 (2000).

19. Indiana Code section 34-20-2-1 imposes liability when
a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user’s or consumer’s property . . . if . . . that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.

20. During the 2006 survey period, the Indiana Supreme Court decided *Vaughn v. Daniels Co. (West Virginia), Inc.*, 841 N.E.2d 1133 (Ind. 2006). That case helped to further define who qualifies as a “user” or “consumer” for purposes of bringing an action under the IPLA. In that case, Daniels Company (“Daniels”) designed and built a coal preparation plant at a facility owned by Solar Sources, Inc. (“Solar”). *Id.* at 1136. Part of the design involved the installation of a heavy media coal sump. *Id.* An out-of-state steel company manufactured the sump that Daniels designed and sent it, unassembled, to the facility. *Id.* Stephen Vaughn worked for the construction company that Daniels hired to install the sump. *Id.* During the installation process, Vaughn climbed onto the top of the sump to help connect a pipe. *Id.* The chain he was using to secure the pipe in place gave way, causing Vaughn to fall and sustain injuries. *Id.* Vaughn did not wear his safety belt when he climbed onto the sump. *Id.* The Indiana Supreme Court held that Daniels could not be liable under the IPLA because Vaughn was not a “user” or “consumer.” *Id.* at 1141-43. Because the “product” was not assembled and installed at the time of Vaughn’s accident, “neither Vaughn nor anyone else was a user of the product at the time it was still in the process of assembly and

B. "Manufacturer" or "Seller"

For purposes of the IPLA, "[m]anufacturer' . . . means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer."²¹ "Seller' . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption."²² Indiana Code section 34-20-2-1(2) employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless "the seller is engaged in the business of selling the product."²³

Sellers can be held liable as manufacturers in two ways. First, a seller can be held liable as a manufacturer if the seller fits within Indiana Code section 34-6-2-77(a)'s definition of "manufacturer," which expressly includes a seller who:

- (1) has actual knowledge of a defect in a product;
- (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;
- (3) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer;
- (4) is owned in whole or significant part by the manufacturer; or
- (5) owns in whole or significant part the manufacturer.²⁴

Second, a seller can be deemed a statutory "manufacturer" and, therefore, be held liable to the same extent as a manufacturer in one other limited circumstance. Indiana Code section 34-20-2-4 provides that a seller may be deemed a "manufacturer" "if the court is unable to hold jurisdiction over a particular manufacturer" and if the seller is the "manufacturer's principal

installation." *Id.* at 1139.

21. IND. CODE § 34-6-2-77 (2004).

22. *Id.* § 34-6-2-136.

23. *Id.* § 34-20-2-1(2); *see, e.g., Williams v. REP Corp.*, 302 F.3d 660, 662-64 (7th Cir. 2002) (recognizing that Indiana Code § 33-1-1.5-2(3), the predecessor to Indiana Code § 34-20-2-1, imposes a threshold requirement that an entity must have sold, leased, or otherwise placed a defective and unreasonably dangerous product into the stream of commerce before IPLA liability can attach and before that entity can be considered a "manufacturer" or "seller"); *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp. 2d 730, 745-46 (N.D. Ind. 2002) (holding that although the defendant provided some technical guidance or advice relative to ponds at an asphalt plant, such activity was not sufficient to constitute substantial participation in the integration of the plant with the pond so as to deem it a "manufacturer" of the plant); *see also Joseph R. Alberts & James M. Boyers, Survey of Recent Developments in Indiana Product Liability Law*, 36 IND. L. REV. 1165, 1170-72 (2003).

24. IND. CODE § 34-6-2-77(a) (2004).

distributor or seller.”²⁵

One other provision exists which practitioners must be aware in connection with liability of “sellers” under the IPLA. When the theory of liability is based on “strict liability in tort,”²⁶ Indiana Code section 34-20-2-3 provides that an entity that is merely a “seller” and cannot be deemed a “manufacturer” is not liable and is not a proper IPLA defendant.²⁷

There were no significant published decisions during the survey period that interpreted the terms “manufacturer” or “seller.”²⁸

25. *Id.* § 34-20-2-4. *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004), is the most recent case interpreting Indiana Code section 34-20-2-4 and specifically addressing the circumstances under which entities may be considered “manufacturers” or “sellers” under the IPLA. *See also* *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070, at *14-15 (S.D. Ill. Jan. 8, 2002). The court, applying Indiana law, examined the “unable to hold jurisdiction over” requirement of Indiana Code section 34-20-2-4. *Id.* at *9. The plaintiff assumed that “jurisdiction” refers to the power of the court to hear a particular case. *Id.* at *9-10. The defendant argued that the phrase equates to “personal jurisdiction.” *Id.* at *12. The court refused to resolve the issue, deciding instead to simply deny the motion for summary judgment because the designated evidence did not clearly establish entitlement to application of Indiana Code section 34-20-2-4. *Id.* at *14-15.

26. The phrase “strict liability in tort,” to the extent that the phrase is intended to mean “liability without regard to reasonable care,” appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 provides that cases utilizing a design defect or a failure to warn theory are judged by a negligence standard, not a “strict liability” standard.

27. IND. CODE § 34-20-2-3 (2004). In *Ritchie v. Glidden Co.*, 242 F.3d 713, 725-26 (7th Cir. 2001), the court cited what is now Indiana Code section 34-20-2-3 for the proposition that sellers in a product liability action may not be liable unless the seller can be deemed a manufacturer. Applying that reading of what is now Indiana Code section 34-20-2-3, the court held that defendant Glidden could not be liable pursuant to the IPLA because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of an alleged product defect (lack of warning labels) and because Glidden did not meet any of the other statutory definitions or circumstances under which it could be deemed a manufacturer. *Id.* There is an omission in the *Ritchie* court’s citation to what is now Indiana Code section 34-20-2-3 that may be quite significant. The statutory provision quoted in *Ritchie* leaves out the following important highlighted language: “[A] product liability action [based on the doctrine of strict liability in tort] may not be commenced or maintained.” *Id.* at 725 (emphasis added). The *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. *Id.* Indiana Code section 34-20-2-2 makes it clear that “liability without regard to the exercise of reasonable care” (strict liability) applies now only to product liability claims alleging a manufacturing defect theory. Claims alleging design or warning defect theories are controlled by a negligence standard. *See, e.g.,* *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899 (N.D. Ind. 2002); *see also* *Alberts & Boyers, supra* note 23, at 1173-75.

28. The 2006 survey period produced two important decisions in this area. In *Thornburg v. Stryker Corp.*, No. 1:05-cv-1378-RLY-TAB, 2006 WL 1843351 (S.D. Ind. June 29, 2006), the plaintiff underwent hip replacement surgery and subsequently filed product liability and medical malpractice claims against defendants Stryker Corporation (“Stryker”) and Howmedica Osteonics

C. Physical Harm Caused by a Product

For purposes of the IPLA, “[p]hysical harm” . . . means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”²⁹ It “does not include gradually evolving damage to property or economic losses from such damage.”³⁰

For purposes of the IPLA, “[p]roduct” . . . means any item or good that is personalty at the time it is conveyed by the seller to another party.”³¹ “The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”³²

Although it is a “not for publication” memorandum decision, *Fincher v. Solar Sources, Inc.*³³ is an opinion that was rendered during the survey period and to which practitioners may look for additional guidance about what is and what

Corp. d/b/a Stryker Orthopaedics (“HOC”). *Id.* at *1. Stryker moved for summary judgment, contending that it did not manufacture or sell the device that Thornburg alleged caused her injuries. *Id.* Thornburg cited “only Stryker’s status as HOC’s parent company to support her claims against Stryker.” *Id.* at *4. According to the court, such “evidence alone is ineffectual because it ignores the ‘general principle of corporate law . . . that a parent corporation . . . is not liable for the acts of its subsidiaries.’” *Id.* (quoting *United States v. Bestfoods*, 524 U.S. 51, 60 (1998)). The record was otherwise “bereft of any evidence that Stryker sold, leased, or otherwise placed the allegedly defective hip replacement system into the stream of commerce.” *Id.* Consequently, the court held that Thornburg’s evidence did not satisfy her summary judgment burden and granted summary judgment in Stryker’s favor. *Id.*

In *Fellner v. Philadelphia Toboggan Coasters, Inc.*, No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006), Tamara Fellner was killed when she was ejected from a wooden roller coaster train operated as an attraction at Holiday World amusement park. *Id.* at *1. The company that owned and operated the park and the roller coaster, Koch Development Corp. (“Koch”), could not be held liable with respect to plaintiffs’ strict liability and breach of implied warranty claims because it was neither a manufacturer nor a seller of the roller coaster. *Id.* at *3-4.

29. IND. CODE § 34-6-2-105(a) (2004).

30. *Id.* § 34-6-2-105(b); *see, e.g., Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (denying a motion to dismiss a case determining that Indiana recognizes that pregnancy may be considered a “harm” in certain circumstances); *Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 493 (Ind. 2001) (holding that “personal injury and damage to other property from a defective product are actionable under the [IPLA], but their presence does not create a claim under the Act for damage to the product itself”); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 486 (Ind. 2001) (holding that there is no recovery under the IPLA where a claim is based on damage to the defective product itself); *see also Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc.*, No. IP 00-1378-C-H/K, 2002 U.S. Dist. LEXIS 7830, at *2 (S.D. Ind. Apr. 29, 2002) (holding that there was no recovery under the IPLA in a case involving a motor home destroyed in a fire allegedly caused by a defective wire in the engine compartment).

31. IND. CODE § 34-6-2-114(a) (2004).

32. *Id.* § 34-6-2-114(b).

33. No. 42A01-0701-CV-25, 2007 WL 1953473 (Ind. Ct. App. 2007) (mem.).

is not a “product” for purposes of the IPLA. In *Fincher*, the plaintiff was a truck driver who was injured in an accident while hauling coal sludge.³⁴ Coal sludge has a wet consistency and is comprised of the fine particulate matter that remains after raw coal is mined and put through a washing process.³⁵ A panel of the Indiana Court of Appeals unanimously agreed that coal sludge was not a product under the IPLA.³⁶ According to the *Fincher* court,

[t]he coal sludge in question is a waste by-product of a coal mining operation. It is trash. The coal sludge was not marketable or ever in a marketed state. It was not sold or being transported to a consumer. It was being transported to a disposal site. It was also never intended for consumption or for any use by any consumer.³⁷

D. Defective and Unreasonably Dangerous

Only products that are in a “defective condition” are ones for which IPLA liability may attach.³⁸ For purposes of the IPLA, a product is in a “defective condition”

if, at the time it is conveyed by the seller to another party, it is in a condition:

- (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
- (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.³⁹

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.⁴⁰

Claimants in Indiana may prove that a product is in a “defective condition” by asserting one or a combination of three theories: (1) the product has a defect in its design (a “design defect”); (2) the product lacks adequate or appropriate warnings (a “warning defect”); or (3) the product has a defect that is the result of a malfunction or impurity in the manufacturing process (a “manufacturing defect”).⁴¹

34. *Id.* at *1.

35. *Id.*

36. *Id.* at *6.

37. *Id.*

38. IND. CODE § 34-20-2-1(1) (2004); *see also* *Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006).

39. IND. CODE § 34-20-4-1 (2004).

40. *See* *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003) (“[U]nder the IPLA, the plaintiff must prove that the product was in a defective condition that rendered it unreasonably dangerous.” (citing *Cole v. Lantis Corp.*, 714 N.E.2d 194, 198 (Ind. Ct. App. 1999))).

41. *See* *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 689 (7th Cir. 2004); *Westchester Fire Ins. Co.*, 2006 WL 3147710, at *5; *Baker*, 799 N.E.2d at

Although claimants are free to assert any of those three theories for proving that a product is in a “defective condition,” the IPLA provides explicit statutory guidelines identifying when products are not defective as a matter of law. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA].”⁴² In addition, Indiana Code section 34-20-4-4 provides that “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”⁴³

In addition to the two specific statutory pronouncements identifying when a product is not “defective” as a matter of law, Indiana law also defines when a product may be considered “unreasonably dangerous” for purposes of the IPLA. A product is “unreasonably dangerous” only if its use “exposes the user or consumer to a risk of physical harm . . . beyond that contemplated by the ordinary consumer who purchases [it] with the ordinary knowledge about the product’s characteristics common to the community of consumers.”⁴⁴ A product is not

1140; *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997). *Troutner v. Great Dane Ltd. Partnership*, No. 2:05-CV-040-PRC, 2006 WL 2873430 (N.D. Ind. Oct. 5, 2006), provides additional authority confirming that a plaintiff’s product liability claim will fail as a matter of law if he or she does not articulate a legitimate manufacturing, design, or warning defect. In that case, the plaintiff was a semi-truck driver who fell and suffered head injury when a grab bar mounted on his trailer gave way. *Id.* at *1. The plaintiff sued the companies that manufactured and sold the trailer and the grab bar, alleging that they placed a trailer with a grab bar into the stream of commerce in a defective and unreasonably dangerous condition. *Id.* The case was removed to federal court, and both manufacturing defendants moved for summary judgment, pointing out that “plaintiff’s own expert . . . testified that the most likely cause of the failure of the grab bar was inadequate and negligent maintenance.” *Id.* at *3. The plaintiff did not file a response to either motion. *Id.* at *1. Because, under such circumstances, no reasonable jury could find for plaintiff on the product liability claims, the court granted summary judgment. *Id.* at *3.

42. IND. CODE § 34-20-4-3 (2004). One recent case discussing “reasonably expectable use” is *Hunt v. Unknown Chemical Manufacturer No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138, at *28-32 (S.D. Ind. Nov. 5, 2003) (Homeowner tore down and burned a deck that was made from lumber treated with chromium copper arsenate. He spread the ashes as fertilizer in the family garden. Later tests of the soil in the garden revealed elevated levels of arsenic. Judge Larry McKinney held that homeowner could not pursue product liability claim because his use of the lumber was not, legally speaking, foreseeable, intended, or expected.).

43. IND. CODE § 34-20-4-4.

44. *Id.* § 34-6-2-146; see also *Baker*, 799 N.E.2d at 1140; *Cole v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999). In *Baker*, a panel of the Indiana Court of Appeals wrote that “[t]he question whether a product is unreasonably dangerous is *usually* a question of fact that must be resolved by the jury.” 799 N.E.2d at 1140 (emphasis added) (citing *Vaughn v. Daniels Co. (W. Va.)*, Inc., 717 N.E.2d 1110, 1128 (Ind. Ct. App. 2002), *vacated*, 841 N.E.2d 1133 (2006)). Those panels also seem to favor jury resolution in determining reasonably expected use. Indeed, the *Baker* opinion states that

unreasonably dangerous as a matter of law if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product.⁴⁵

In cases alleging improper design or inadequate warnings as the theory for proving that a product is in a “defective condition,” recent decisions have quite clearly recognized that the substantive defect analysis (i.e., whether a design was inappropriate or whether a warning was inadequate) should *follow* a threshold analysis that first examines whether, in fact, the product at issue is “unreasonably

reasonably expectable use, like reasonable care, involves questions concerning the ordinary prudent person, or in the case of products liability, the ordinary prudent consumer. The manner of use required to establish “reasonably expectable use” under the circumstances of each case is a matter peculiarly within the province of the jury.

Id. (citing *Vaughn*, 777 N.E.2d at 1128).

It would seem incorrect, however, to conclude from those pronouncements that there exists something akin to a presumption that juries always *should* resolve whether a product is unreasonably dangerous or whether a use is reasonably expectable. Indeed, recent cases have resolved the defective and unreasonably dangerous issue as a matter of law in a design defect context even in the presence of divergent expert testimony.

In *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002), the plaintiff was injured when a blade guard on a circular table saw struck him in the eye after one of his co-workers left the guard “in what appeared to be in the installed position.” *Id.* at 895. With respect to the defective design claims, plaintiff’s expert opined that the saw was defective and unreasonably dangerous by its design, suggesting that the saw could be designed so that the guard could be attached without tools or that the tools could be physically attached to the saw. *Id.* at 900. The court rejected the claim, holding that the plaintiff and his expert had “wholly failed to show a feasible alternative design that would have reduced the risk of injury.” *Id.*; *see also* *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *1-4 (S.D. Ind. Oct. 15, 2002) (holding that Honeywell’s design specifications for planetary gears and gear carrier assembly within the engine of an Army UH-1 helicopter were not defective as a matter of law at the time the specifications were introduced into the stream of commerce).

45. *See Baker*, 799 N.E.2d at 1140; *see also* *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (writing that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability). An open and obvious danger negates liability. “To be unreasonably dangerous, a defective condition must be hidden or concealed [and] evidence of the open and obvious nature of the danger . . . negates a necessary element of the plaintiff’s prima facie case that the defect was hidden.” *Hughes v. Battenfeld Gloucester Eng’g Co.*, No. TH 01-0237-C T/H, 2003 U.S. Dist. LEXIS 17177, at *7-8 (S.D. Ind. Aug. 20, 2003) (quoting *Cole*, 714 N.E.2d at 199). In *Hughes*, the plaintiff injured his hand while separating and rethreading plastic film through a machine called a secondary treater nip station. *Id.* at *2-3. Plaintiff admitted that he knew about the dangers associated with using the nip station because he was aware of reports by co-workers who were injured performing similar tasks. *Id.* at *4. Plaintiff testified that he was aware of the alleged defect that caused his accident, and on two previous occasions he had filed written suggestions with his employer requesting that it reduce the risk of injury involved. *Id.* at *4. Judge Tinder held that the dangerous condition of the nip station was open and obvious as a matter of law and entered summary judgment. *Id.* at *17.

dangerous.”⁴⁶

The IPLA provides that liability attaches for placing in the stream of commerce a product in a “defective condition”⁴⁷ even though: “(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”⁴⁸ What the IPLA bestows, however, in terms of liability despite the exercise of “all reasonable care [i.e., fault],” it then removes for design and warning defect cases, replacing it with a negligence standard:

[I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.⁴⁹

The statutory language is, therefore, clear; it imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the “exercise of all reasonable care”) only for those claims relying upon a manufacturing defect theory.⁵⁰ Thus, just as in any other negligence case, a claimant advancing design

46. Indeed, in *Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *1 (S.D. Ind. July 20, 2005), *aff’d*, 452 F.3d 632 (7th Cir. 2006) (involving an alleged design defect) and *Conley v. Lift-All Co.*, No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at *1 (S.D. Ind. July 25, 2005) (involving an alleged warnings defect), Judge Hamilton followed that precise approach.

47. IND. CODE § 34-20-2-1(1) (2004).

48. *Id.* § 34-20-2-2.

49. *Id.*

50. See *Mesman v. Crane Pro Servs.*, 409 F.3d 846, 849 (7th Cir. 2005) (“Under Indiana’s products liability law, a design defect can be made the basis of a tort suit only if the defect was a result of negligence in the design.”); *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.4 (7th Cir. 2004) (“Both Indiana’s 1995 statute (applicable to this case) and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles.”); *Conley*, 2005 U.S. Dist. LEXIS 15468, at *12-13 (“The IPLA effectively supplants [the plaintiff’s] common law claims because all of his claims are brought by a user or consumer against a manufacturer for physical harm caused by a product. Plaintiff’s common law claims will therefore be treated as merged into the IPLA claims.”); *Bourne*, 2005 U.S. Dist. LEXIS 15467, at *9 n.2 (“[P]laintiffs may not pursue a separate common law negligence claim [for design defect]. Their negligence claim is not dismissed but is more properly merged with the statutory claim under the IPLA, which includes elements of negligence.”), *aff’d*, 452 F.3d 632 (7th Cir. 2006); see also *Miller v. Honeywell Int’l Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (S.D. Ind. Oct. 15, 2002), *aff’d*, 2004 U.S. Dist. LEXIS 15261 (7th Cir. July 26, 2004); *Burt v. Makita, USA, Inc.*,

or warning defect theories must satisfy the traditional negligence requirements—duty, breach, injury, and causation.⁵¹ Despite the IPLA's unambiguous language and several years worth of authority recognizing that "strict liability" applies only in cases involving alleged manufacturing defects, some courts unfortunately continue to employ the term "strict liability" when referring to IPLA claims, even when those claims allege warning and design defects and clearly accrued after the 1995 amendments took effect.⁵²

1. *Manufacturing Defect Theory*.—In *Gaskin v. Sharp Electronics Corp.*,⁵³ plaintiff Mary Gaskin rented a house in which her seventy-four-year-old mother, Lee Ester Gaskin, also resided.⁵⁴ On March 2, 2004, a fire broke out in the house.⁵⁵ Lee Ester died in the fire.⁵⁶ Plaintiffs sued Sharp Electronics ("Sharp"), the manufacturer of the television, "alleging that Sharp [was] strictly liable for designing, manufacturing, and placing into the stream of commerce the . . . television in an unreasonably dangerous and/or defective condition."⁵⁷ They also alleged that "Sharp was negligent in the design, manufacture, and marketing of the television."⁵⁸ The television at issue was located in Lee Ester's bedroom on

212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003).

51. *E.g.*, *Conley*, 2005 U.S. Dist. LEXIS 15468, at *13-14 ("To withstand summary judgment, [the plaintiff] must come forward with evidence tending to show: (1) [the defendant] had a duty to warn the ultimate users of its sling that dull or rounded load edges could cut an unprotected sling; (2) the hazard was hidden and thus the sling was unreasonably dangerous; (3) [the defendant] failed to exercise reasonable care under the circumstances in providing warnings; and (4) [the defendant's] alleged failure to provide adequate warnings was the proximate cause of his injuries.").

52. *See, e.g.*, *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt*, 212 F. Supp. 2d at 900; *see also* *Fellner v. Phila. Toboggan Coasters, Inc.*, No. 3:05-CV-218-SEB-WGH, 2006 WL 2224068, at *1, *4 (S.D. Ind. Aug. 2, 2006) (cause of action accrued on May 31, 2003); *Cincinnati Ins. Cos. v. Hamilton Beach/Proctor-Silex, Inc.*, No. 4:05 CV 49, 2006 WL 299064, at *2-3 (N.D. Ind. Feb. 7, 2006) (cause of action accrued on June 30, 2003); *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1138 (Ind. 2006) (cause of action accrued on December 12, 1995).

53. No. 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007).

54. *Id.* at *1-2.

55. *Id.* at *1.

56. *Id.* at *2.

57. *Id.* As noted above, although the plaintiffs alleged strict liability ostensibly based upon theories of defective design and warnings, Indiana law does not permit strict liability in cases espousing those theories as a way to prove a product is defective. *See* IND. CODE § 34-20-2-2 (2004). Indiana law permits strict liability to attach only when a manufacturing defect theory is pursued. *See id.*

58. *Gaskin*, 2007 U.S. Dist. LEXIS 72347, at *2. Damages suffered as a result of Lee Ester's death, physical injuries suffered by Mary, and destruction of the home and its contents (other than the television itself) would appear to be the "physical harm" covered by the IPLA for which plaintiffs seek legal redress. The IPLA provides the legal basis for recovery of damages against

a television stand.⁵⁹ “Lee Ester Gaskin did not smoke, and she did not have any candles in the room. Mary Gaskin testified that the television was the only electrical appliance in the room, and the only item plugged into an electrical outlet. The television was largely destroyed in the fire.”⁶⁰

Sharp moved for summary judgment, arguing that plaintiffs “put forth insufficient evidence to prove that the television was defective.”⁶¹ In their response, plaintiffs did not address Sharp’s arguments concerning their design and warning defect theories.⁶² As a result, the court deemed plaintiffs’ arguments on those points to be waived and granted summary judgment to Sharp with respect to those two theories.⁶³ With regard to the manufacturing defect theory, the court identified the critical evidence as the testimony of Steven Shand, plaintiffs’ fire cause and origin expert.⁶⁴ Shand investigated the scene two days after the fire, by which time the damaged structure had been partially excavated, debris had been thrown out of the window, and there were missing items, including the television.⁶⁵

“Based upon a burn pattern analysis, the degree of destruction, and the evidence [he] examined,” Shand concluded that the fire originated in the

Sharp, the television manufacturer, as a result of such harm. The IPLA does not appear to contemplate “negligent manufacture” or “negligent marketing” theories. To the extent that the plaintiffs attempted in their complaint to pursue separate, non-IPLA-based negligence claims for the physical harm noted above, Indiana law does not appear to allow them to do so. The IPLA would, however, permit a “negligence” action to the extent that plaintiffs pursued a theory of liability against Sharp based upon allegedly defective design or warnings. *See* IND. CODE § 34-20-2-2. In either of those instances, the claim is essentially a “negligence” claim because it would require plaintiffs to prove that Sharp was negligent in its design of the television or in communicating its warnings or instructions. *See id.* Under the current IPLA, plaintiffs need not prove that Sharp was negligent if they employ a manufacturing defect theory to demonstrate defectiveness because it remains the only theory for which strict liability is available. *See id.*

59. *Gaskin*, 2007 U.S. Dist. LEXIS 72347, at *4.

60. *Id.*

61. *Id.* at *11-12.

62. *Id.* at *11.

63. *Id.*

64. *Id.* at *5-6. Plaintiffs also disclosed another liability expert, Dennis Dyl. *Id.* at *5. Dyl “opined that a poor pin connection on the CRT board inside the television resulted in high electrical resistance which generated heat and caused the fire.” *Id.* The trial court struck Dyl’s testimony “because it did not comport with the reliability requirements of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993).” *Id.* The court subsequently clarified that ruling, determining that Dyl could testify regarding “general principles,” “background testimony,” and “observations during his data collection” at trial only if plaintiffs could “show, depending upon all of the evidence, that it is relevant” and if plaintiffs “tie up the proposed evidence so that it fits the fact[s] of the case.” *Id.* at *2. Because the trial judge did not know what plaintiffs would be able to establish at trial, it presumed for the purpose of resolving Sharp’s motion for summary judgment, that the testimony from Dyl would be inadmissible in its entirety. *Id.* at *3.

65. *Id.* at *5-6.

northwest corner bedroom near the television stand.⁶⁶ He “concluded that the fire did not start on the bed” and also “eliminated the [two] receptacle outlets, the wall light switch, the overhead light, the closet, and the electrical wiring in the wall as possible sources of the fire.”⁶⁷ He could not offer a more definitive cause determination because he had not been able to examine all of the evidence removed from the scene.⁶⁸ With respect to the television in particular, “Shand stated during his deposition that he is not qualified to render any opinions about the television, [and,] therefore, he [did] not have an opinion [about] whether the television was the cause of the fire.”⁶⁹ Shand testified that, although he had no opinion about whether the television started the fire, it was the only ignition source that had not been eliminated.⁷⁰

In support of their legal position, plaintiffs relied heavily upon *Ford Motor Co. v. Reed*⁷¹ and *Whitted v. General Motors Corp.*⁷² Plaintiffs cited *Reed* for the proposition that plaintiffs could demonstrate the existence of a manufacturing defect in one of four ways: (1) producing an expert witness “to offer direct evidence of a specific manufacturing defect”; (2) producing an expert witness to circumstantially prove that a specific defect caused the product failure; (3) introducing “direct evidence from an eyewitness of the malfunction, supported by expert testimony explaining the possible causes of the defective condition”; and/or (4) introduction of “inferential evidence by negating other possible causes.”⁷³ Because the evidence provided by Shand was insufficient to satisfy any of the first three methods for proving manufacturing defect, the judge in *Gaskin* recognized that the only viable method of proving manufacturing defect available to the plaintiffs was the fourth method—introduction of inferential evidence by negating other possible causes.⁷⁴

Although recognizing that only the fourth method identified in *Reed* was “potentially” applicable to the case at hand, the court acknowledged “some confusion” about whether *any* of the methods identified in *Reed*, which are admittedly quite “similar to a *res ipsa loquitor* test, are truly applicable to Indiana products liability law.”⁷⁵ As a result, the judge carefully considered both

66. *Id.* at *6. In his report, Shand wrote that: “[a] television stand located in the area of fire origin had nearly been consumed and a ‘V’ pattern on the east wall established that the fire had burned upward and outward from the stand.” *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at *6-7.

70. *Id.* at *7. From his examination of the wall receptacle, Shand testified in his deposition that he believed only one receptacle had something plugged into it at the time of the fire, but could not rule out the possibility that there was a multi-prong adapter plugged into the receptacle. *Id.*

71. 689 N.E.2d 751 (Ind. Ct. App. 1997).

72. 58 F.3d 1200 (7th Cir. 1995).

73. *Gaskin*, 2007 U.S. Dist. LEXIS 72347, at *13 (citing *Reed*, 689 N.E.2d at 753).

74. *Id.*

75. *Id.* Courts have required the introduction of expert testimony in *res ipsa loquitor* actions. See, e.g., *Smoot v. Mazda Motors of Am., Inc.*, 469 F.3d 675 (7th Cir. 2006) (holding that plaintiff

the *Reed* and *Whitted* cases, ultimately determining that it would

recognize[] the four factors set forth in *Reed* as ‘helpful tools’ in the basic inquiry as to whether there is sufficient evidence of a defect, and recognize[] that in some rare circumstances, circumstantial evidence can produce reasonable inferences from which a jury can reasonably find that the defendant manufactured a product containing a defect.⁷⁶

In *Gaskin*, the judge noted that the evidence before him was “weaker than that in *Reed*, because . . . no expert has testified that the television caused the fire, and no expert has pinpointed exactly where the fire started in the television.”⁷⁷ “However,” he continued, “like in *Reed*, [p]laintiffs, with the help of Shand, have basically eliminated all other potential causes of the fire.”⁷⁸ He ultimately concluded as follows:

Viewing the facts in the light most favorable to the nonmovant, as this [c]ourt must on summary judgment, it finds that Shand has sufficiently negated other reasonably possible causes, and [p]laintiffs have satisfied the fourth method of proving a manufacturing defect as annunciated in *Whitted* and *Reed*. Moreover . . . Shand’s testimony that the fire started just [n]orth of the television stand (within several inches) was consistent with the theory that the television started the fire, and that the entertainment center was within the area of fire origin. Plaintiffs have demonstrated that there is a genuine issue of material fact as to whether the television caused the fire, and specifically, whether Sharp placed into the stream of commerce a television set that was defectively manufactured.⁷⁹

The parties also disputed whether plaintiffs had sufficiently demonstrated that the defective condition of the television existed at the time it left Sharp’s control. As noted above, there are two threshold IPLA requirements that an Indiana product liability plaintiff must establish as part of his or her prima facie case: (1) a product’s defective and unreasonably dangerous condition existed at the time it was conveyed by the seller to another party;⁸⁰ and (2) the defective product reached the user or consumer without substantial alteration.⁸¹ The court in *Gaskin* held that the plaintiffs offered enough evidence to preclude summary judgment with regard to those threshold proof requirements.⁸² The court pointed to evidence that the television at issue: (1) “was only two months old at the time

could not sustain an action for *res ipsa loquitur* without admissible expert testimony because the inference of negligence was obvious only to an expert).

76. *Id.* at *16 (citing *Reed*, 689 N.E.2d at 754).

77. *Id.* at *18.

78. *Id.*

79. *Id.* at *21 (citation omitted).

80. IND. CODE § 34-20-4-1 (2004).

81. *Id.* § 34-20-2-1.

82. *Gaskin*, 2007 U.S. Dist. LEXIS 72347, at *23-24.

of the [fire]”; (2) was purchased from a local retailer; (3) was “unwrapped in a pristine condition”; (4) “was only used for approximately one month”; (5) had no problems before the fire; (6) was not mishandled, and (7) “was never repaired.”⁸³ Accordingly, the judge in *Gaskin* concluded that, “although the evidence presented by [p]laintiffs is scant, it is sufficient to create a triable issue of fact. Plaintiffs produced enough evidence to raise a material issue of fact that the Sharp television . . . caused a fire due to a manufacturing defect.”⁸⁴

It should be briefly noted here that the parties and the court in *Gaskin* seem to have well-recognized that evidence of a product’s condition after leaving the manufacturer’s or seller’s control is important *both* as an IPLA-mandated threshold requirement for which the plaintiff bears the burden of proof, as well as an IPLA-based affirmative defense for which the defendant bears the burden of proof.⁸⁵

2. *Design Defect Theory*.—Decisions that address substantive design defect allegations in Indiana require plaintiffs to prove the existence of what practitioners and judges often refer to as a “safer, feasible alternative” design.⁸⁶ Plaintiffs must demonstrate that another design not only could have prevented the injury, but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.⁸⁷ One panel of the Seventh Circuit (Judge Easterbrook writing) has described that “a design-defect claim in Indiana is a negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accidents.”⁸⁸ Stated in a slightly different way, “[t]he [p]laintiff bears the burden of proving a design to be unreasonable, and must do so by showing there are other safer alternatives, and that the costs and benefits of the safer design make it unreasonable to use the less safe design.”⁸⁹

83. *Id.* at *24. The parties also disputed whether Sharp has properly raised the state-of-the-art presumption in Indiana Code section 34-20-5-1 and, if so, whether plaintiffs had rebutted it. Although professing that it was not deciding whether Sharp had properly raised the presumption, the court concluded that the plaintiffs had “put forth enough evidence of a manufacturing defect that a rational jury could find that the presumption has been overcome.” *Id.* at *25. A more detailed discussion about this portion of the *Gaskin* decision is addressed in *infra* note 273 and accompanying text.

84. *Gaskin*, 2007 U.S. LEXIS 72347, at *25.

85. Part IV.C., *infra*, addresses those points in more detail.

86. In cases alleging improper design to prove that a product is in a “defective condition,” the substantive defect analysis may need to follow a threshold “unreasonably dangerous” analysis if one is appropriate. *See, e.g., Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *10-20 (S.D. Ind. July 20, 2005), *aff’d*, 452 F.3d 632 (7th Cir. 2006).

87. *See Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

88. *McMahon v. Bunn-o-matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

89. *Westchester Fire Ins. v. Am. Wood Fibers, Inc.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006) (citing *Bourne*, 432 F.3d at 638). Another recent Seventh Circuit case postulates that a design defect claim under the IPLA requires applying the classic

Indiana's requirement of proof of a safer, feasible alternative design is similar to what a number of other states require in the design defect context. Indeed, that requirement is reflected in Section 2(B) of the Restatement (Third) of Torts and the related comments.⁹⁰

In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard.⁹¹ As such, a claimant can hardly find a manufacturer negligent for adopting a particular design unless he or she can prove that a reasonable manufacturer in the exercise of ordinary care would have adopted a different and safer design. The claimant must prove that the safer, feasible alternative design was in fact available and that the manufacturer unreasonably failed to adopt it.⁹²

In addition, the IPLA adopts "comment k" of the Restatement (Second) of Torts for all products and, by statute, "[a] product is not defective . . . if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly."⁹³ Thus, a manufacturer technically cannot make the "comment k" statutory defense available until and unless the claimant demonstrates a rebuttal. That raises interesting questions in light of Indiana's quirky treatment of Trial Rule 56 under *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*⁹⁴ In federal court, under a *Celotex*⁹⁵ standard, a manufacturer may file a summary judgment motion based upon the "comment k" defense, challenging the claimant to rebut the defense through properly designated proof of feasible alternative design. Under Indiana's treatment of Rule 56, however, the manufacturer bears the burden of affirmatively showing the unavailability of the safer, feasible alternative design.⁹⁶ Regardless of the procedure governing the motion itself, the claimant still must prove the existence of a safer, feasible alternative design to rebut the IPLA's "comment k" defense.⁹⁷

formulation of negligence: B [burden of avoiding the accident] < P [probability of the accident that the precaution would have prevented] L [loss that the accident if it occurred would cause]. See *Bourne*, 452 F.3d at 637; see also *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (referencing Judge Learned Hand's articulation of the "B<PL" negligence formula).

90. RESTATEMENT (THIRD) OF TORTS § 2(B) (1998).

91. IND. CODE § 34-20-2-2 (2004); see also *Westchester Fire Ins.*, 2006 WL 3147710, at *5; *Bourne*, 452 F.3d at 637.

92. To excuse that requirement would be tantamount to excusing the reasonable care statutory component of design defect liability. By way of example, a manufacturer could not be held liable under the IPLA for adopting design "A" unless there was proof that through reasonable care the manufacturer would have instead adopted design "B." To make that case, a claimant must show the availability of design "B" as an evidentiary predicate to establish before proceeding to the other "reasonable care" elements.

93. IND. CODE § 34-20-4-4 (2004).

94. 644 N.E.2d 118 (Ind. 1994).

95. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

96. IND. TRIAL R. 56.

97. See, e.g., *Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 637 (7th Cir. 2006); McMahon

During the 2006 survey period, the Indiana Supreme Court in *Schultz v. Ford Motor Co.*⁹⁸ endorsed the foregoing burden of proof analysis in design defect claims in Indiana.⁹⁹ State and federal courts applying Indiana law have issued several important decisions in recent years that address design defect claims.¹⁰⁰

3. *Warning Defect Theory.*—The IPLA contains a specific statutory provision covering the warning defect theory, which reads as follows:

A product is defective . . . if the seller fails to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.¹⁰¹

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the same as the requirement that the defect be latent or hidden.¹⁰²

v. Bunn-o-matic Corp., 150 F.3d 651, 657 (7th Cir. 1998); *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc.*, No 2:03-CV-178-TS, 2006 WL 3147710, at *5 (N.D. Ind. Oct. 31, 2006); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

98. 857 N.E.2d 977 (Ind. 2006).

99. *Id.* at 985 n.12 (“For a discussion of the burden of proof at summary judgment in a design defect claim, see Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 39 IND. L. REV. 1145, 1158-60 (2006)”).

100. See, e.g., *Bourne*, 452 F.3d 632, 633, 638-39 (holding that a football goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law). *Bourne* is a significant decision for Indiana product liability practitioners because it reinforces at least four important precepts: (1) “defective condition” and “unreasonably dangerous” are not interchangeable terms; (2) the concept of “open and obvious” remains relevant in Indiana product liability law even though it is no longer a stand-alone defense; (3) whether a product presents an unreasonable danger can and should, under the proper circumstances, be decided by a judge as a matter of law; and (4) a claimant’s expert testimony must be sufficient, even at summary judgment stage, to satisfy Indiana’s safer, feasible alternative design requirement in cases in which the claimant pursues a design defect claim. See generally *Bourne*, 452 F.3d 632; see also *Westchester Fire Ins.*, 2006 WL 3147710 (dismissing design defect claim based on allegations that a defectively designed wood flour product spontaneously combusted and caused a fire because the plaintiff presented no evidence showing there was a safer, reasonably feasible alternative); *Lytle v. Ford Motor Co.*, 814 N.E.2d 301 (Ind. Ct. App. 2004) (holding, inter alia, that the theories offered by plaintiffs’ opinion witnesses regarding the inadvertent unlatching of a seatbelt were not reliable and that designated evidence failed to show that Ford’s seatbelt design was defective or unreasonably dangerous); *Baker v. Heye-Am.*, 799 N.E.2d 1135 (Ind. Ct. App. 2003) (holding that fact issues precluded summary judgment with respect to whether the placement of, and lack of a guard for, a maintenance stop button rendered a glass molding machine defective or unreasonably dangerous or both).

101. IND. CODE § 34-20-4-2 (2004).

102. See *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682,

Indiana courts have been active in recent years in deciding cases espousing warning defect theories. Some of those cases include: *Tober v. Graco Children's Products, Inc.*,¹⁰³ *Ford Motor Co. v. Rushford*,¹⁰⁴ *Williams v. Genie Industries, Inc.*,¹⁰⁵ *Conley v. Lift-All Co.*,¹⁰⁶ *First National Bank & Trust Corp. v. American Eurocopter Corp. ("Inlow II")*,¹⁰⁷ and *Birch v. Midwest Garage Door Systems*.¹⁰⁸

690 n.5 (7th Cir. 2004). For a more detailed analysis of *Inlow II*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 38 IND. L. REV. 1205, 1221-27 (2005).

103. 431 F.3d 572 (7th Cir. 2005). For more detailed discussion and commentary about *Tober*, see Joseph R. Alberts & James Petersen, *Survey of Recent Developments in Indiana Product Liability Law*, 40 IND. L. REV. 1007, 1028-30 (2007).

104. 845 N.E.2d 197 (Ind. Ct. App. 2006), *rev'd*, 868 N.E.2d 806 (Ind. 2007). For more detailed discussion and commentary about the reversed Indiana Court of Appeals's opinion in *Rushford*, see Alberts & Petersen, *supra* note 103, at 1030-32.

105. No. 3:04-CV-217 CAN, 2006 WL 1408412 (N.D. Ind. May 19, 2006). For more detailed discussion and commentary about *Williams*, see Alberts & Petersen, *supra* note 103, at 1032-33.

106. No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468 (S.D. Ind. July 25, 2005).

107. *Inlow II*, 378 F.3d 682, *aff'g In re Inlow Accident Litig. (Inlow I)*, No. IP 99-0830-C H/K, 2002 U.S. Dist. LEXIS 8318 (S.D. Ind. Apr. 16, 2002). In the *Inlow* cases, a helicopter rotor blade struck and killed the Consecro general counsel, Lawrence Inlow, as he passed in front of the helicopter after disembarking. *Id.* at 685. Because of the helicopter's high-set rotor blades, the court determined as a matter of law that the deceleration-enhanced blade flap was a hidden danger of the helicopter and that the manufacturer had a duty to warn its customers of that danger. *Id.* at 691. The court ultimately held, however, that the manufacturer satisfied its duty to warn Consecro and Inlow as a matter of law in light of the sophisticated intermediary doctrine. *Id.* at 692-93.

108. 790 N.E.2d 504 (Ind. Ct. App. 2003). In *Birch*, a young girl sustained serious injuries when the garage door closed on her. *Id.* at 508. The court concluded that the garage door system at issue was not defective and that a change in an applicable federal safety regulation, in and of itself, does not make a product defective. *Id.* at 518. Additionally, the court concluded that there was no duty to warn plaintiffs about changes in federal safety regulations because the system manual the plaintiffs received included numerous warnings regarding the type of system installed and that no additional information about garage door openers would have added to the plaintiffs' understanding of the characteristics of the product. *Id.* at 518-19. For a more detailed analysis of *Birch*, see Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Indiana Product Liability Law*, 37 IND. L. REV. 1247, 1262-64 (2004); *see also* *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893 (N.D. Ind. 2002) (rejecting plaintiff's argument that a saw should have had warning labels making it more difficult for the saw guard to be left in a position where it appeared installed when in fact it was not; the scope of the duty to warn is determined by the foreseeable users of the product and there was no evidence that the circumstances of plaintiff's injuries were foreseeable such that defendants had a duty to warn against those circumstances); *McClain v. Chem-Lube*, 759 N.E.2d 1096 (Ind. Ct. App. 2001) (holding that the trial court should have addressed whether the risks associated with use of a product were unknown or unforeseeable and whether the defendants had a duty to warn of the dangers inherent in the use of the product, because designated evidence showed that both defendants knew that the product at issue was to be used in conjunction with high temperatures that occurred as a result of the hot welding process). For a more detailed analysis of *Burt* and *McClain*, see Alberts & Boyers, *supra* note 23, at 1183-85.

On June 29, 2007, the Indiana Supreme Court decided *Ford Motor Co. v. Rushford*.¹⁰⁹ *Rushford* is noteworthy for its impact on retail sellers of products in Indiana because it holds that mere retail sellers may not owe a duty to warn, absent special circumstances, when the seller passes along adequate manufacturer's warnings.¹¹⁰

Marilyn Rushford sued Ford Motor Company and Eby Ford Lincoln Mercury a/k/a Eby Ford Sales, Inc. ("Eby Ford") by filing a two-count complaint.¹¹¹ Rushford argued strict product liability in her first count, alleging that a 2002 Ford Focus Wagon she and her husband purchased in 2002 was defective and unreasonably dangerous because Ford and Eby Ford failed to provide adequate warnings about the danger the front seat air bags posed to short adults.¹¹² The second count alleged negligence against Ford and Eby Ford for not placing a warning "that the deployment of the air bags could cause injury to adults such as [Rushford]."¹¹³ Both Ford and Eby Ford moved for summary judgment in the trial court.¹¹⁴ Both motions were denied.¹¹⁵ On April 11, 2006, the Indiana Court of Appeals concluded that Ford discharged its duty to warn by providing adequate warning to Rushford in the owner's manual and on the visor. The court reversed the trial court's denial of Ford's motion for summary judgment.¹¹⁶ The court of appeals, however, found that a question of fact existed as to whether Eby Ford exercised reasonable care under the circumstances by failing to warn or instruct Rushford to read the air bag warning in the owner's manual.¹¹⁷ Rushford did not contest the court of appeals's ruling in favor of Ford before the Indiana Supreme Court.¹¹⁸ Thus, the supreme court was left to decide the scope of duty owed by a retail seller to an Indiana buyer when a manufacturer's warning is adequate.

Marilyn Rushford was seventy years old when she and her husband purchased the 2002 Ford Focus wagon.¹¹⁹ Rushford informed Eby Ford's salesman that she had never driven an automobile and that she would not drive the Focus.¹²⁰ A few weeks after their purchase, Rushford sustained serious personal injuries¹²¹ when her husband collided with another vehicle, causing the

109. 868 N.E.2d 806 (Ind. 2007).

110. *See generally id.*

111. *Id.* at 808-09.

112. *Id.*

113. *Id.* at 809.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 808. Although last year's survey article recounted the facts of *Rushford*, *see* Alberts & Petersen, *supra* note 103, at 1030-32, they are again briefly discussed here to place the court's decision in context.

120. *Ford Motor Co.*, 868 N.E.2d at 808.

121. Rushford claimed that the collision caused her to suffer the loss of her left thumb, serious

vehicle's front passenger air bag to deploy.¹²²

The front passenger visor of the car contained the following warning:

! WARNING

DEATH or SERIOUS INJURY can occur

Children 12 and under can be killed by the air bag

The BACK SEAT is the SAFEST place for children

NEVER put a rear-facing child seat in the front

Sit as far back as possible from the air bag

ALWAYS use SEAT BELTS and CHILD RESTRAINTS¹²³

The warning also contained a pictogram visually demonstrating air bag deployment against a rear-facing child seat.¹²⁴

The owner's manual contained the following warning:

Seating and Safety Restraints

While the system is designed to help reduce serious injuries, it may also cause abrasions, swelling or temporary hearing loss. Because air bags must inflate rapidly and with considerable force, there is the risk of death or serious injuries such as fractures, facial and eye injuries or internal injuries, particularly to occupants who are not properly restrained or are otherwise out of position at the time of air bag deployment. Thus, it is extremely important that occupants be properly restrained as far away from the air bag module as possible while maintaining vehicle control.¹²⁵

Rushford conceded that she saw the visor warning.¹²⁶ She claimed, however, that she did not read the warning closely.¹²⁷ She admitted seeing similar warnings in other vehicles the couple had owned, but thought visor warnings only pertained to child safety.¹²⁸ Similarly, she did not read the warning in the owner's manual because she did not drive the vehicle and because no one at Eby Ford told either Rushford or her husband that the manual contained a warning addressing air bags.¹²⁹

As in the trial court, Rushford conceded that the manufacturer's warnings on the visor and in the owner's manual were adequate.¹³⁰ On transfer, the Indiana Supreme Court noted that manufacturers owe a duty to provide adequate instructions for safe use and to provide warning as to dangers inherent in

injuries to her left hand and wrist, cervical fractures, and a head laceration. *Id.* at 808 n.2.

122. *Id.* at 808.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 810.

improper use.¹³¹ Quoting statutory language in the IPLA, the court wrote that for a buyer to succeed, he or she must demonstrate ““that the manufacturer or seller failed to exercise reasonable care under the circumstances.””¹³² The adequacy of a warning is generally reserved as a question of fact; however, the nature of the duty to warn is a question of law to be answered by the courts.¹³³

Rushford argued that because the car dealer knew she would not drive the vehicle, the dealer should have instructed her to read the warnings provided by Ford.¹³⁴ Unlike the Indiana Court of Appeals, which analyzed Rushford’s claim against the dealer through a breach of duty lens, the Indiana Supreme Court framed the issue as whether a duty existed in the first instance: “That is to say, what duty to warn of dangers does a retail seller owe to a user or consumer of a product when such dangers already have been communicated by the product’s manufacturer.”¹³⁵ In answering its own question, the court held:

[I]n the absence of any evidence that the product has been modified in some fashion and that the seller knew or should have known of any such modification, its duty to warn is discharged where the seller provides the buyer with the manufacturer’s warning of the danger at issue. In other words absent special circumstances, if the manufacturer provides adequate warnings of the danger of its products and the seller passes this warning along to the buyer or consumer, then the seller has no obligation to provide additional warnings.¹³⁶

Because Eby Ford had provided Rushford with the manufacturer’s warnings, it had no duty to provide additional warnings.¹³⁷ Doing so would place Eby Ford in the precarious position of determining which of the manufacturer’s particular warnings may be of unique importance to each consumer and then drawing the consumer’s attention to these specific warnings.¹³⁸

Rushford establishes that a retail seller can rely upon adequate warnings provided by a manufacturer. In reaching its decision, the *Rushford* court relied on the heeding presumption recognized in Indiana in *Dias v. Daisy-Heddon*¹³⁹ nearly thirty years ago.¹⁴⁰ Many times, the manufacturer is in the best position to know and understand the risks inherent in the use and misuse of an unaltered or unmodified product. In situations as in *Rushford*, where a retail seller merely sells a product in the same condition as received from the manufacturer, the seller, like the manufacturer, should rely on the fact that when adequate warnings

131. *Id.*

132. *Id.* (quoting IND. CODE § 34-20-2-2 (2004)).

133. *Id.*

134. *Id.*

135. *Id.* at 810-11.

136. *Id.* at 811.

137. *Id.*

138. *Id.* at 811-12.

139. 390 N.E.2d 222 (Ind. Ct. App. 1979).

140. *Rushford*, 868 N.E.2d at 811.

are given with a product, they will be read and heeded by a user or consumer. *Rushford* fails to address circumstances in which the manufacturer's warnings are inadequate or the product has been modified after it has left the manufacturer's control. In such circumstances, a retail seller may still owe a duty to warn or to provide additional warnings and instructions.

E. Regardless of the Substantive Legal Theory

Indiana Code section 34-20-1-1 provides that the IPLA "governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; *regardless of the substantive legal theory or theories upon which the action is brought*."¹⁴¹ At the same time, however, Indiana Code section 34-20-1-2 provides that the "[IPLA] shall not be construed to limit any other action from being brought against a seller of a product."¹⁴² In cases where a person who is a user or consumer under the IPLA sues an entity that is a manufacturer or seller under the IPLA for what is indisputably a physical harm caused by a product, the IPLA merges and subsumes all other tort-based theories of recovery such as common law negligence claims, tort-based breach of warranty claims, and non-IPLA-based statutory claims.¹⁴³

Three cases decided during last year's survey period, *Cincinnati Insurance Cos. v. Hamilton Beach/Proctor-Silex, Inc.*,¹⁴⁴ *Ryan v. Philip Morris USA, Inc.*,¹⁴⁵

141. IND. CODE § 34-20-1-1 (2004) (emphasis added).

142. *Id.* § 34-20-1-2.

143. The statutory theory applies because in Indiana the causes of action that typically seek redress for physical harm spring from tort-based theories of recovery. *See* N.H. Ins. Co. v. Farmer Boy AG, Inc., No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at *10-11 (S.D. Ind. Dec. 19, 2000) (holding that a claim alleging breach of implied warranty in tort has been superceded by IPLA-based liability, and thus, plaintiff could proceed on a warranty claim so long as it was limited to a breach of contract theory).

144. No. 4:05 CV 49, 2006 WL 299064 (N.D. Ind. Feb. 7, 2006). There, a fire that allegedly started in a toaster manufactured by the defendant, Hamilton Beach/Proctor Silex ("Hamilton Beach"), destroying a couple's home and personal property. *Id.* at *1. Cincinnati Insurance insured the couple's home and brought a subrogation action against Hamilton Beach, asserting claims for negligence, breach of warranty, strict liability, violation of the Magnuson-Moss Warranty Act, and negligent failure to recall. *Id.* Hamilton Beach moved to dismiss the negligence, warranty, Magnuson-Moss, and negligent failure to recall claims. *Id.* The court agreed that the IPLA subsumes and incorporates all negligence and tort-based warranty claims. *Id.* at *2.

145. No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006). In *Ryan*, the widow of a man who allegedly died as a result of smoking asserted causes of action against several cigarette manufacturers for product liability, negligence, and fraud. *Id.* at *1. The defendants argued that the IPLA provides the sole and exclusive remedy for personal injuries allegedly caused by a product. *Id.* at *2. The court agreed, holding that the IPLA unequivocally precludes plaintiff's common law negligence and fraud claims. *Id.*

and *Fellner v. Philadelphia Toboggan Coasters, Inc.*,¹⁴⁶ reinforce the IPLA merger premise under such circumstances. The merger premise should apply, however, only to tort-based theories of recovery when a product causes physical harm. Contract-based warranty theories of recovery are independent from tort-based warranty theories, and the former undoubtedly fall into the category of “any other action” that Indiana Code section 34-20-1-2 does not limit.¹⁴⁷

146. No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006). The *Fellner* case involved a person who was killed when she was ejected from a wooden roller coaster at Holiday World amusement park. *Id.* at *1. One of the defendants that the personal representative of Fellner’s estate sued was Koch Development Corp. (“Koch”), the entity that owned and operated both Holiday World and the roller coaster involved. *Id.* Plaintiff sought to hold Koch liable for negligence, strict liability, and breach of implied warranties. *Id.* Like the decisions in *Cincinnati Insurance* and *Ryan*, the *Fellner* decision held that the tort-based implied warranty claim merged into plaintiff’s IPLA-based product liability claims, resulting in dismissal of the breach of implied warranty claim because it was not a stand-alone theory of recovery. *Id.* at *4. As noted above, however, it is important to point out that the *Fellner* decision employs the term “strict liability” as if it is synonymous with all IPLA-based product liability claims. *Id.* It is not. The IPLA imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the exercise of “all reasonable care”) only for those claims relying upon a manufacturing defect theory. IND. CODE § 34-20-2-2 (2004); see also *Mesman v. Crane Pro Servs.*, 409 F.3d 846, 849 (7th Cir. 2005) (“Under Indiana’s products liability law, a design defect can be made the basis of a tort suit only if the defect was a result of negligence in the design”); *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp.* (*Inlow II*), 378 F.3d 682, 690 n.4 (7th Cir. 2004) (“Both Indiana’s 1995 statute . . . and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles.”); *Conley v. Lift-All Co.*, No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at *12-13 (S.D. Ind. July 25, 2005) (“The IPLA effectively supplants [the plaintiff’s] common law claims because all of his claims are brought by a user or consumer against a manufacturer for physical harm caused by a product. Plaintiff’s common law claims will therefore be treated as merged into the IPLA claims.”); *Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at *9 n.2 (S.D. Ind. July 20, 2005) (“[P]laintiffs may not pursue a separate common law negligence claim [for design defect]. Their negligence claim is not dismissed but is more properly merged with the statutory claim under the IPLA, which includes elements of negligence.”), *aff’d*, 452 F.3d 632 (7th Cir. 2006); *Miller v. Honeywell Int’l, Inc.*, No. IP98-1742C-M/S, 2002 U.S. Dist. LEXIS 20478, at *38 (S.D. Ind. Oct. 15, 2002), *aff’d*, 107 Fed. Appx. 693 (7th Cir. 2004); *Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Kennedy v. Guess, Inc.*, 765 N.E.2d 213, 220 (Ind. Ct. App. 2002), *vacated*, 806 N.E.2d 776 (Ind. 2004). Thus, when interpreting the *Fellner* decision, practitioners should recognize that the court merged the tort-based breach of implied warranty claim into the IPLA claim even though only plaintiff’s manufacturing defect theory involves “strict liability.”

147. *Fellner*, 2006 WL 2224068, at *4; see also *Farmer Boy AG*, 2000 U.S. Dist. LEXIS 19502, at *10-11 (holding that a claim alleging breach of implied warranty in tort has been superceded by IPLA-based liability, and thus, plaintiff could proceed on a warranty claim so long

A potential conflict between Indiana Code sections 34-20-1-1 and 34-20-1-2 might exist, however, in cases in which the factual circumstances disqualify a claim from being brought under the IPLA yet a product nevertheless causes the physical harm for which the plaintiff seeks redress. In recent years, courts have made no mention of the possibility of a conflict between the two provisions and have had little trouble allowing claims involving plaintiffs and defendants that are otherwise outside the IPLA's scope to exist when a product has caused physical harm.¹⁴⁸ In those instances, practitioners are left to ponder to what degree section 34-20-1-2's admonition against limiting "any other action" conflicts with section 34-20-1-1's apparent requirement that *all* claims for physical harm caused by a product "regardless of the substantive legal theory or theories upon which the action is brought" be merged into the IPLA. Legislative action may be the only way to definitively resolve the issue.

II. STATUTES OF LIMITATION AND REPOSE

The IPLA contains a statute of limitation and a statute of repose for product liability claims. Indiana Code section 34-20-3-1 provides:

(a) This section applies to all persons regardless of minority or legal disability. Notwithstanding [Indiana Code section] 34-11-6-1, this section applies in any product liability action in which the theory of liability is negligence or strict liability in tort.

(b) Except as provided in section 2 of this chapter, a product liability action must be commenced:

- (1) within two (2) years after the cause of action accrues; or
- (2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action

as it was limited to a breach of contract theory).

148. See, e.g., *Ritchie v. Glidden Corp.*, 242 F.3d 713 (7th Cir. 2000); *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002) (applying Indiana law); *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2004). In a case decided during the 2006 survey period, *Dutchmen Manufacturing, Inc. v. Reynolds*, 849 N.E.2d 516 (Ind. 2006), the Indiana Supreme Court allowed a negligence claim based upon section 388 of the Restatement (Second) of Torts to proceed against a tenant's predecessor and a landlord in a case involving personal injuries sustained as a result of an alleged failure to warn the successor tenant about a known defect in the scaffolding. *Id.* at 518-21. However, the scaffolding was assembled and installed by the predecessor tenant in a manner that affixed it to the ceiling beams of the leased building. *Id.* at 520-22. Therefore, the case does not appear to involve any "product liability" claims because the injury does not appear to have occurred as the result of any "product" placed in the stream of commerce. *Id.* at 522-23.

accrues.¹⁴⁹

Product liability cases involving asbestos products, however, have a unique statute of limitations. Indiana Code section 34-20-3-2(a) provides that “[a] product liability action based” upon either “property damage resulting from asbestos” or “personal injury, disability, disease, or death resulting from exposure to asbestos . . . must be commenced within two (2) years after the cause of action accrues.”¹⁵⁰ That rule applies, however, “only to product liability actions against . . . persons who mined and sold commercial asbestos,” and to “funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.”¹⁵¹

A. Statute of Limitations

In *Frye v. MedComp, Inc.*,¹⁵² Frye filed a product liability suit in an Indiana state court, alleging that a catheter inserted for chemotherapy on May 14, 2004, had malfunctioned causing chemotherapeutic agents to leak into his neck and chest resulting in permanent damage.¹⁵³ He filed his complaint on May 12, 2006, naming MedComp, Inc. as a defendant.¹⁵⁴ On September 18, 2006, the trial court issued an alias summons.¹⁵⁵ The alias summons, still listing “MedComp, Inc.” as the defendant, was served on Medical Components, Inc. on October 19, 2006, whose counsel appeared and removed the case to federal court on November 13, 2006, based upon diversity jurisdiction.¹⁵⁶

Medical Components moved to dismiss Frye’s suit because it had not been properly named as a defendant and because the two-year statute of limitations in Indiana Code section 34-20-3-1(b) barred the claim.¹⁵⁷ The district court agreed, reasoning that Indiana law requires both the filing of the complaint and the tendering of the summons to the clerk within the statutory time period to timely commence suit.¹⁵⁸ The court noted that Frye realized at some point that serving

149. IND. CODE § 34-20-3-1 (2004).

150. *Id.* § 34-20-3-2(a).

151. *Id.* § 34-20-3-2(d). For a discussion of the asbestos-related statute of repose, see *Ott v. AlliedSignal, Inc.*, 827 N.E.2d 1144 (Ind. Ct. App. 2005).

152. No. 1:06-cv-1635-SEB-VSS, 2007 U.S. Dist. LEXIS 5672 (S.D. Ind. Jan. 24, 2007).

153. *Id.* at *1.

154. *Id.* at *2.

155. *Id.* MedComp, Inc. appeared by counsel and filed an answer. *Id.* MedComp, Inc., an Indiana corporation, was a separate and distinct company, unrelated to the proper defendant who supplied the catheter, Medical Components, Inc. *Id.* at *5. Curiously, however, the plaintiff never amended his complaint to name the proper defendant, even though causing an alias summons to be issued and served on the correct defendant. *See id.* at *2.

156. *Id.*

157. *Id.* at *3-6.

158. *Id.* at *6 (citing IND. TRIAL R. 3).

MedComp, Inc. was a mistake.¹⁵⁹ Regardless, he never attempted to amend his complaint to name the proper defendant and the proper defendant was not served until 159 days after the complaint was filed, well outside the 120-day time period permitted by Federal Rule of Civil Procedure 4(m).¹⁶⁰ As a result, the suit was untimely under the Federal Rules of Civil Procedure, the Indiana Trial Rules, and the IPLA as well.¹⁶¹

B. Statute of Repose

As was the case during prior survey periods, the current survey period saw more cases interpreting and applying the IPLA's statute of repose to bar asbestos claims against companies that did not mine asbestos. On August 31, 2007, the Indiana Court of Appeals handed down a series of cases arising out of plaintiff Bill Littlefield's exposure to asbestos.¹⁶² Two of these cases discuss and apply the statute of repose, *Dap, Inc. v. Akaiwa*¹⁶³ and *TH Agriculture and Nutrition, LLC v. Akaiwa*.¹⁶⁴

Littlefield was exposed to asbestos some time between June 1, 1976, and August 1, 1982.¹⁶⁵ As a result of his exposure, he was diagnosed with mesothelioma on July 17, 2004.¹⁶⁶ Prior to the diagnosis Littlefield had no reason to believe that he had been exposed to asbestos.¹⁶⁷ On January 10, 2005, Littlefield filed a complaint naming numerous defendants, including TH Agriculture and Nutrition, LLC ("THAN").¹⁶⁸ Littlefield died on July 25, 2005,

159. *Id.* at *8.

160. *Id.* at *5 n.4, *8.

161. *Id.* at *8-9.

162. The series of cases decided concurrently by the court of appeals includes *Asbestos Corp. v. Akaiwa*, 872 N.E.2d 1095 (Ind. Ct. App. 2007); *Dap, Inc. v. Akaiwa*, 872 N.E.2d 1098 (Ind. Ct. App. 2007); *TH Agric. & Nutrition, LLC v. Akaiwa (THAN)*, 872 N.E.2d 1104 (Ind. Ct. App. 2007); *TH Agric. & Nutrition, LLC v. Nevius*, 872 N.E.2d 708 (Ind. Ct. App. 2007) (unpublished table decision); and *Sun Chem v. Akaiwa*, 872 N.E.2d 708 (Ind. Ct. App. 2007). *Dap, Inc.* and *THAN* substantively discuss and apply the statute of repose. See *Dap, Inc.*, 872 N.E.2d at 1098; *THAN*, 872 N.E.2d at 1104. Although the defendant in *Asbestos Corp.* raised the statute of limitations defense, the court of appeals did not substantively discuss or analyze it. 872 N.E.2d at 1095-98. The single issue the court found dispositive was whether the plaintiff had presented sufficient evidence of exposure to Asbestos Corp. Ltd. ("ACL") asbestos to survive summary judgment. *Id.* at 1095, 1098. The court of appeals found that the plaintiff had not presented sufficient evidence and reversed the trial court's denial of ACL's motion for summary judgment. *Id.* at 1098. The remaining two decisions, *TH Agric. & Nutrition, LLC v. Nevius* and *Sun Chem v. Akaiwa*, are unpublished and are not included in this survey.

163. 872 N.E.2d 1098 (Ind. Ct. App. 2007).

164. 872 N.E.2d 1104 (Ind. Ct. App. 2007).

165. *Id.* at 1105.

166. *Id.*

167. *Id.*

168. *Id.* TH Agriculture and Nutrition, LLC ("THAN") "was formed in 1998 and is the

and Akaiwa was substituted as his representative to maintain the actions.¹⁶⁹ THAN moved for summary judgment asserting the suit was time-barred.¹⁷⁰ Akaiwa resisted, contending that THAN was a distributor and/or supplier of raw asbestos fiber mined by other entities and therefore was a mining company, which would not allow THAN to avail itself of the ten-year statute of repose in Indiana Code section 34-20-3-1.¹⁷¹ In other words, Akaiwa tried to avoid the statute of repose by relying on Indiana Code section 34-20-2-4¹⁷² claiming that THAN was a miner under the IPLA because it stood as the principal distributor in Indiana for a bankrupt asbestos mining company over whom Indiana court's could not exercise jurisdiction.¹⁷³ The trial court apparently agreed and denied THAN's motion.¹⁷⁴

Observing that Akaiwa had ignored Indiana's statute of repose, the court of appeals was not persuaded.¹⁷⁵ Relying on *AlliedSignal v. Ott*,¹⁷⁶ the court acknowledged that Indiana's Supreme Court previously decided that the specific language chosen by the Indiana General Assembly when it drafted section 2¹⁷⁷ represented a conscious intent only to subject those entities that mined and sold commercial asbestos to the section.¹⁷⁸ All other entities that merely sold asbestos-containing products were subject to section 1 and claims against them could be extinguished by the passage of time and the IPLA's ten-year statute of

successor by merger to TH Agriculture and Nutrition, Inc., formerly known as Thompson-Hayward Chemical Company ("THCC")." *Id.* at 1004. THCC did not mine asbestos or manufacture asbestos-containing products. *Id.* At one time THCC did distribute various grades of chrysotile asbestos fibers to portions of the United States between 1960 and 1980 on behalf of Carey-Canadian Mines, Ltd. and maintained a distribution facility for a few years in the mid-1960s in Indianapolis, Indiana. *Id.* At the time of the suit, Carey was in bankruptcy. *Id.*

169. *Id.* at 1106.

170. *Id.*

171. *Id.* at 1106-08.

172. Indiana Code section 34-20-2-4 states:

If a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered, *for the purposes of this chapter*, the manufacturer of the product.

IND. CODE § 34-20-2-4 (2004) (emphasis added).

173. *THAN*, 872 N.E.2d at 1106.

174. *Id.*

175. *Id.* at 1106-07.

176. 785 N.E.2d 1068, 1073 (Ind. 2003) (holding the language used represents the conscious intent of the legislature).

177. Indiana Code section 34-20-3 contains the statutes of limitations and repose for product liability actions. The general product liability statute of limitations and repose is codified at Indiana Code section 34-20-3-1 or "section 1." Certain asbestos-related cases are exempted from Indiana's ten-year statute of repose and are governed by Indiana Code section 34-20-3-2 or "section 2."

178. *THAN*, 872 N.E.2d at 1107.

repose.¹⁷⁹ In short, the “[s]upreme [c]ourt’s express holding in *Ott*¹⁸⁰ foreclose[d] the application of section 2 to non-miner defendants.”¹⁸¹ The court noted that Akaiwa did not dispute that THAN did not mine asbestos.¹⁸² Moreover, the court noted that Akaiwa’s argument that THAN, a distributor, should be treated as a miner under Indiana Code section 34-20-2-4 was rejected a year earlier in *Briggs v. Griffin Wheel Corp.*,¹⁸³ which Akaiwa had not attempted to distinguish.¹⁸⁴ Because THAN was not an asbestos miner, Akaiwa’s claim was governed by the ten-year statute of repose.¹⁸⁵ Littlefield was last exposed to asbestos more than ten years before filing suit, thus section 1’s statute of repose barred the action.¹⁸⁶

In *Dap, Inc. v. Akaiwa*,¹⁸⁷ the court of appeals also found that the statute of repose barred Akaiwa’s claims against Dap, Inc. (“Dap”).¹⁸⁸ Between 1960 and 1977, Dap manufactured an asphalt sealant and elastic glazing compound, both of which contained asbestos fibers.¹⁸⁹ Dap, however, “did not mine or sell raw asbestos.”¹⁹⁰ Sometime between 1980 and 1982, the decedent used sealants manufactured by Dap, presumably the Dap sealants decedent used between 1980 and 1982 contained asbestos fibers.¹⁹¹ Relying on the ten-year statute of repose, Dap moved for summary judgment.¹⁹² The trial court, however, found that the ten-year statute of repose did not apply.¹⁹³

As in the companion case, *TH Agriculture and Nutrition, LLC*, discussed above, the court of appeals again found *AlliedSignal v. Ott*¹⁹⁴ controlling.¹⁹⁵ The

179. *Id.*

180. *Ott*, 785 N.E.2d at 1073.

181. *THAN*, 872 N.E.2d at 1108.

182. *Id.*

183. 851 N.E.2d 1261, 1263-64 (Ind. Ct. App. 2006). For a detailed discussion and commentary about *Briggs*, see Alberts & Petersen, *supra* note 103, at 1042-43.

184. *THAN*, 872 N.E.2d at 1108.

185. *Id.* at 1109.

186. *Id.* Although not raised by Akaiwa, amici Indiana Trial Lawyers’ Association (“ITLA”) and Defense Trial Counsel of Indiana (“DTCI”) participated in the appeal to address whether section 1 and section 2 violated article I, section 23 of the Indiana Constitution. *Id.* at 1108. The court of appeals again found the *Ott* decision controlling because it had previously addressed the constitutionality of the application of the statute of repose to non-miners. *Id.* at 1108-09. Thus, the constitutionality of the statute of limitations and repose were beyond the scope of its permissible review. *Id.*

187. 872 N.E.2d 1098 (Ind. Ct. App. 2007).

188. *Id.* at 1103.

189. *Id.* at 1099.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. 785 N.E.2d 1068, 1073 (Ind. 2003).

195. *Dap, Inc.*, 872 N.E.2d at 1100-04. Although Akaiwa did not timely file his appellee’s brief, the court of appeals nevertheless addressed the case on its merits. *Id.* at 1100.

court reasoned that because Dap was not a miner, section 2¹⁹⁶ was inapplicable.¹⁹⁷ Thus, the ten-year statute of repose contained in section 1 barred it because the action was commenced more than twenty years after the decedent's last possible exposure to asbestos.¹⁹⁸ Noting that *Ott* left open the possibility that the statute of repose "'might be unconstitutional as applied to the plaintiff if a reasonably experienced physician could have diagnosed [the plaintiff] with an asbestos-related illness or disease within the ten-year statute of repose, yet [the plaintiff] had no reason to know of the diagnosable condition until the ten-year period had expired,'"¹⁹⁹ the court then turned to the constitutionality of the statute of repose.²⁰⁰

In the trial court, Akaiwa argued that a reasonable physician could have diagnosed the decedent "within ten years after his exposure, even [though] doing so would have involved a medically unethical procedure."²⁰¹ Nonetheless, Akaiwa conceded that the decedent had no reason to seek medical diagnosis or treatment until he developed signs and symptoms of an asbestos-related illness in June 2004.²⁰² The court recognized that its 2005 decision in *Jurich v. John Crane, Inc.*²⁰³ expressly rejected the arguments made by Akaiwa in the trial court because *Ott*'s requirement of a manifested asbestos related illness or disease that could have been diagnosed by a reasonably skilled physician²⁰⁴ "refers to a disease that is a clinically-recognized symptomatic condition, or one that could have been detected by a competent physician conducting a routine examination of the patient."²⁰⁵ It excludes asymptomatic conditions or those that could only be discovered using "extreme and medically unsound or unethical measures."²⁰⁶ Because the decedent exhibited no symptoms until June 2004, approximately twenty-two years after his last exposure to asbestos, Akaiwa's argument that section 1 was unconstitutional as applied did not persuade the court of appeals.²⁰⁷

196. Recall that section 1 refers to Indiana Code section 34-20-3-1 and section 2 refers to section 34-20-3-2.

197. *Dap, Inc.*, 872 N.E.2d at 1101.

198. *Id.*

199. *Id.* (quoting *AlliedSignal v. Ott*, 7785 N.E.2d 1068, 1075 (Ind. 2003)).

200. *Id.*

201. *Id.* at 1101-02.

202. *Id.*

203. 824 N.E.2d 777, 780-83 (Ind. Ct. App. 2005).

204. *Ott*, 785 N.E.2d at 1076.

205. *Dap, Inc.*, 872 N.E.2d at 1102 (quoting *Jurich*, 824 N.E.2d at 783).

206. *Id.*

207. *Id.* at 1102-03. As in *TH Agriculture and Nutrition, LLC* ("THAN"), 872 N.E.2d. at 1108-09, amici Indiana Trial Lawyers' Association ("ITLA") and Defense Trial Counsel of Indiana ("DTCI") participated in the appeal to address whether section 1 and section 2 violated article I, section 23 of the Indiana Constitution. *Dap, Inc.*, 872 N.E.2d at 1102. With text nearly identical to that used in *THAN*, the court again passed on the constitutionality question finding that the issue was beyond the scope of its permissible review. *Id.*

III. EVIDENTIARY PRESUMPTION FOR COMPLIANCE WITH STATE-OF-THE-ART AND GOVERNMENT STANDARDS

The IPLA, via Indiana Code section 34-20-5-1, entitles a manufacturer or seller to a rebuttable presumption that the product causing the physical harm is not defective and that the product's manufacturer or seller is not negligent if, before the sale by the manufacturer, the product:

- (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or
- (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.²⁰⁸

A. *Compliance with State-of-the-Art*

The 2007 survey period included the first published opinion by an Indiana court giving a rebuttable presumption jury instruction based on Indiana Code section 34-20-5-1 for a state-of-the-art product. In *Bourke v. Ford Motor Co.*,²⁰⁹ plaintiff Anna Bourke brought suit against Ford on behalf of the Estate of Richard Bourke.²¹⁰ Bourke alleged that the 2000 Ford Explorer was defectively designed because it possessed inadequate rollover resistance.²¹¹ The court provided the jury with instructions defining state-of-the-art and that Ford was entitled to a rebuttable presumption that the Explorer was not defective and that Ford was not negligent if it had proven that the vehicle was state-of-the-art.²¹² The first instruction setting forth the presumption read:

Ford Motor Company has alleged that the 2000 Ford Explorer was manufactured in conformity with the state of the art. Ford has the burden of proving this allegation.

If you find that Ford Motor Company has proved by a preponderance of the evidence that before the 2000 Ford Explorer was sold by them, the product: was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged and labeled; then you may presume that the 2000 Ford Explorer was not defective and Ford Motor Company is not negligent and find for them.

208. IND. CODE § 34-20-5-1 (2004).

209. No. 2:03-CV-136, 2007 U.S. Dist. LEXIS 15871 (N.D. Ind. Mar. 5, 2007).

210. *Id.* at *2.

211. *Id.*

212. *Id.* at *2-3.

However, if Plaintiff has introduced evidence tending to disprove this proposition then you may, but are not required to, find that the 2000 Ford Explorer was defective.²¹³

The instruction defining "state of the art" read:

The term "state of the art" is defined as the best technology reasonably feasible at the time the product was designed, manufactured, packaged and labeled.

Whether a product was manufactured in conformity with the generally recognized state of the art you may consider: evidence of the existing level of technology, industry standards, the lack of other advanced technology and the product's safety record at the time the product was designed, manufactured, packaged and labeled.²¹⁴

The jury returned a verdict in favor of Ford.²¹⁵ Bourke sought a new trial claiming that there was insufficient evidence to support the state of the art instructions and because the instructions failed to adequately differentiate between state of the art and industry custom.²¹⁶

The court began by addressing whether its instructions were correct statements of the law and, if not, whether any error caused Bourke to suffer any prejudice.²¹⁷ Bourke agreed that the court's rebuttable presumption instruction was correct. Thus, the court had little difficulty finding that the instruction was not error.²¹⁸ Bourke, however, asserted that the state of the art instruction was erroneous because it failed to distinguish between state of the art and industry custom.²¹⁹ The court disagreed, reasoning that the instruction at issue defining state of the art is nearly identical to an instruction approved in *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*²²⁰ As in *Indianapolis Athletic Club*, the reference to industry standards was within the context of a list containing several factors that a jury could consider.²²¹ Because the court concluded that both instructions contained accurate recitations of applicable law, there was no error and a new trial was not warranted.²²²

Bourke next claimed that there was insufficient evidence to support

213. *Id.*

214. *Id.* at *3.

215. *Id.*

216. *Id.*

217. *Id.* at *4-5.

218. *Id.* at *5-6.

219. *Id.*

220. *Id.* at *6 (citing *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*, 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999)).

221. *Id.* at *6-8.

222. *Id.* at *7-8.

giving the two instructions.²²³ The court interpreted Bourke's argument as one contending "that the jury's verdict was against the . . . weight of the evidence."²²⁴ Bourke argued that Ford had elicited no trial testimony that its rollover resistance system was "state of the art" per se.²²⁵ The court found that Bourke's interpretation was too narrow because whether the actual phrase "state of the art" was brought out during trial did not necessarily prove or disprove the vehicle in fact was state-of-the-art.²²⁶ Again relying on *Indianapolis Athletic Club*, the court reasoned that Ford was only required to

present evidence that would allow a reasonable juror to find that its 2000 Explorer's rollover resistance used the best technology reasonably feasible. To do this, [Ford] was required to present evidence of the existing level of technology, industry standards, the lack of other advanced technology and the product's safety record at the time the 2000 Ford Explorer was designed and manufactured.²²⁷

The court was satisfied that both sides presented ample evidence to explain the state of technology and scientific knowledge with respect to vehicle design, development, and testing as it existed when the 2000 Ford Explorer was designed and manufactured.²²⁸ Thus, a reasonable juror, the court determined, could conclude that the 2000 Ford Explorer was state-of-the-art and find in Ford's favor.²²⁹

B. Compliance with Government Standards

In *Flis v. Kia Motors Corp.* ("Flis I"),²³⁰ Judge Tinder correctly predicted the Indiana Supreme Court's decision in *Schultz v. Ford*²³¹ before the supreme court

223. *Id.* at *8.

224. *Id.*

225. *Id.* at *8-10.

226. *Id.* at *9-10.

227. *Id.* at *10 (citation omitted).

228. *Id.*

229. *Id.* at *10-11.

230. No. 1:03-cv-1567-JDT-TAB, 2005 WL1528227 (S.D. Ind. June 20, 2005).

231. During the 2006 survey period, the Indiana Supreme Court decided *Schultz v. Ford Motor Co.*, 857 N.E.2d 977 (Ind. 2006). *Id.* at 979. The plaintiff ("Schultz") was injured when he lost control of his Ford Explorer. The vehicle rolled over and the roof collapsed, rendering Schultz a quadriplegic. *Id.* Schultz and his wife sued Ford, alleging negligence and defective roof design. *Id.* Ford denied liability and defended the suit. *Id.* During trial Ford relied in part on its compliance with Federal Motor Vehicle Safety Standard ("FMVSS") 216, *id.*, which governed minimum vehicle roof strength. *Id.* at 979 n.1. The trial court gave an instruction based on Indiana Code section 34-20-5-1. The instruction provided that Ford was entitled to a rebuttable presumption that it was not negligent and the Ford Explorer was not defective by virtue of its compliance with FMVSS 216. *Id.* at 979-80. The jury rendered a verdict in favor of Ford. *Id.* at 979. Schultz contended that the giving of the instruction was reversible error. *Id.* at 981. The

granted transfer.²³² As in *Schultz*, *Flis* involved the rollover of a sport utility vehicle, a claim of inadequate roof strength, and the vehicle's compliance with Federal Vehicle Motor Safety Standard ("FMVSS") 216.²³³ Judge Tinder, declined to follow the court of appeals's decision in *Schultz*, determining that the Indiana Supreme Court would decide the case differently, and instructed the jury on Kia's compliance with FMVSS 216 and state-of-the-art.²³⁴ Following the adverse verdict, Jane and Richard Flis filed a motion for a new trial on June 30, 2005.²³⁵ Plaintiffs argued, among other things, that the court erred in giving a final instruction based upon Indiana Code section 34-20-5-1 and Kia's compliance with FMVSS.²³⁶ Judge Tinder waited until the Indiana Supreme Court's ruling in *Schultz* before issuing his decision denying plaintiffs' motion.²³⁷ He recognized that the *Schultz* decision mandates as follows:

([A] presumption is properly given "continuing effect" under the last sentence of Indiana Evidence Rule 301 by the trial court instructing the

Indiana Supreme Court disagreed and affirmed the trial court. *Id.* at 989. Relying on the last sentence contained in Indiana Evidence Rule 301, that presumptions shall have continuing effect, the Indiana Supreme Court rejected the bursting bubble theory of presumptions. *Id.* at 982-85. The court acknowledged that the presumption recognized by Indiana Code section 34-20-5-1 was not a presumption in a traditional legal sense. *Id.* at 985. Nonetheless, giving "continuing effect" to a presumption through a jury instruction furthered the policies that created the presumption in the first place. *Id.* at 986. By authorizing the instruction the court reasoned that it "recognize[d] the policy embodied by the [l]egislature in [the governmental compliance statute], regardless of whether the provision conform[ed] to the conventional definition of a legal 'presumption.'" *Id.* at 986. Finally, the *Schultz* court addressed the concern that the use of the word "presumption" in an instruction could have a prejudicial effect on juries. *Id.* at 986-87. The court suggested that it might be less prejudicial to use words such as "infer" or "assume"; however, the inclusion of the verb "presume" and the noun "presumption" in the jury instruction at issue did not amount to reversible error because on balance the instruction was fair to both parties. *Id.* at 987. Therefore, the court affirmed the trial court's decision to give the jury instruction. *Id.* at 989.

232. *Flis I*, 2005 WL 1528227, at *11.

233. *Id.* at *1-2.

234. *Id.* at *11-16.

235. *Flis v. Kia Motors Corp. (Flis II)*, No. 1:03-CV-1567-JDT-TAB, 2006 U.S. Dist. LEXIS 89436, at *2 (S.D. Ind. Dec. 8, 2006). Plaintiffs' motion for new trial asserted two grounds for relief—juror misconduct and the giving of a governmental compliance instruction. *Id.* As to their allegations of misconduct, the plaintiffs argued that they were entitled to a new trial due to "juror non-disclosure, deceit, and misconduct during voir dire" that resulted in bias against them. *Id.* Although not germane to this product liability survey, Judge Tinder summoned the juror who plaintiffs claimed engaged in the deceitful conduct. *See id.* at 7. After briefing and a full hearing on the merits, including examination of the juror, the court concluded that no juror misconduct had in fact occurred as the juror neither withheld any information during voir dire nor allowed deliberations to be tainted by any outside influences. *Id.* at *5-16.

236. *Id.* at *16.

237. *Id.* at *17-18.

jury that when a basic fact is proven, the jury may infer the existence of a presumed fact.) In so holding, the [c]ourt cited this court's Entry on Governmental-Compliance and State-of-the-Art Instruction in this case. Therefore, under Indiana law as established by the Indiana Supreme Court in *Schultz*, the giving of [a final instruction based on compliance with governmental standards] was not error.²³⁸

Schultz and *Flis* establish the propriety of a governmental compliance instruction in cases where specific codes, standards, regulations, or specifications apply. Another federal case involving Ford decided during the survey period, *Bourke v. Ford Motor Co.*,²³⁹ suggests that the nexus between the compliance and the issues to be tried must be a close fit or the compliance presumption may not be available. Indeed, evidence of compliance may not even be admissible.

Bourke was filed in federal court in the Northern District of Indiana. There, the plaintiff filed a motion in limine to bar any evidence that the 2000 Ford Explorer at issue met any standards that were unrelated to the plaintiff's specific claim that the vehicle possessed inadequate rollover resistance.²⁴⁰ Although it conceded that no federal motor vehicle safety standard specifically addressed vehicle rollover resistance, Ford nevertheless argued that it should be able to introduce evidence of the vehicle's compliance with other federal safety standards to gain the benefit of the rebuttable presumption of non-defectiveness in Indiana Code section 34-20-5-1.²⁴¹ Judge Lozano opined that the language of the statute was clear and unambiguous, and he therefore resolved the issue by parsing the language of Indiana Code section 34-5-20-1.²⁴² He posited that the word "applicable" immediately preceded "codes, standards, regulations, or specifications."²⁴³ Quoting *Black's Law Dictionary*, he wrote, "[a]pplicable is defined as '[f]it, suitable, pertinent, related to, or appropriate; capable of being applied.'"²⁴⁴ The court then reiterated that not all federal motor vehicle safety standards applied to the defect plaintiff alleged in the case.²⁴⁵ The court reasoned that the plain meaning of the word "applicable" required Ford to establish that it complied with a specific standard or regulation regarding the defect at issue, rollover resistance, if it wanted to avail itself of the rebuttable presumption.²⁴⁶ The court then turned to both *Schultz*²⁴⁷ and *Cansler v. Mills*²⁴⁸ to support its

238. *Id.* at *18 (citations omitted).

239. No. 2:03-CV-136, 2007 U.S. Dist. LEXIS 1860 (N.D. Ind. Jan. 8, 2007), *reh'g denied*, No. 2:03-CV-136, 2007 U.S. Dist. LEXIS 15871 (N.D. Ind. Mar. 5, 2007).

240. *Id.* at *2.

241. *Id.* at *2-3.

242. *Id.* at *4-5.

243. *Id.* at *3.

244. *Id.* at *4 (quoting BLACK'S LAW DICTIONARY 98 (6th ed. 1990)).

245. *Id.* at *4-5.

246. *Id.* at *5.

247. 857 N.E.2d 977 (Ind. 2006).

248. 765 N.E.2d 698 (Ind. Ct. App. 2002), *overruled on other grounds*, 857 N.E.2d 977 (Ind.

decision.²⁴⁹ The court observed that in both *Cansler* and *Schultz* the manufacturers were able to rely on the presumption due to compliance with the safety standard governing the specific component or defect at issue.²⁵⁰ Therefore, the court concluded that compliance with any safety standard unrelated to rollover resistance was irrelevant and posed a risk of confusing and misleading the jury.²⁵¹ The pretrial ruling effectively barred evidence of compliance with any federal motor vehicle safety standard.

No Indiana appellate court has yet to squarely address whether compliance with “codes, standards, regulations, or specifications” not directly “applicable” to the specific defect claimed by a plaintiff entitles a manufacturer or seller to the benefit of the rebuttable presumption contained within Indiana Code section 34-5-20-1. As Judge Lozano seems to have correctly observed, a plain reading of Indiana Code section 34-5-20-1 lends support to his pretrial ruling as “applicable” immediately precedes “codes, standards, regulations, or specifications.” Thus, putting aside evidentiary rules, “applicable” connotes, if not requires, the existence of some connection or relevance to the issues in the case for the presumption to take hold. As yet unresolved, however, is just how “applicable” the codes, standards, regulations, or specifications must be before the compliance presumption arises.

The pretrial ruling in *Bourke* may have gone a little too far because compliance could be admissible for another purpose, such as to support a claim of state-of-the-art. Even though the presumption may not arise, the admissibility of compliance is a separate and distinct issue. For instance, industry custom is one factor to be considered by a jury to determine whether a product is state-of-the-art.²⁵² Accordingly, complying or failing to comply with appropriately promulgated and approved codes or standards may tend to prove or disprove whether a product is state-of-the-art. On the other hand, perhaps the fact that no code, standard, regulation, or specification exists addressing the specific claim at issue may help prove or disprove the existing level of technology or lack of other more advanced technology.

IV. DEFENSES

A. *Use with Knowledge of Danger (Incurred Risk)*

Indiana Code section 34-20-6-3 provides that “[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless

2006). In *Cansler*, the issue was non-deployment of a vehicle’s airbag in a collision. *Id.* at 701. FMVSS 208 specifically governs vehicle air bags. *Id.* at 705.

249. *Bourke*, 2007 U.S. Dist. LEXIS 1860, at *5-8.

250. *Id.*

251. *Id.* at *7-8.

252. See *id.* at *6-8; *Indianapolis Athletic Club v. Ako Standard Corp.*, 709 N.E.2d 1070, 1074 (Ind. Ct. App. 1999).

proceeded to make use of the product and was injured.”²⁵³ Incurred risk is a defense that “involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor’s actual knowledge and voluntary acceptance of the risk.”²⁵⁴ It is a “complete” defense in that it precludes a defendant’s IPLA liability (in design and warning defect cases) if it is found to apply to a particular set of factual circumstances.²⁵⁵

There were no significant published decisions during the survey period that addressed incurred risk.

B. Misuse

Indiana Code section 34-20-6-4 provides that it “is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.”²⁵⁶ Knowledge of a product’s defect is not an essential element of establishing the misuse defense. The facts necessary to prove the defense of “misuse” many times may be similar to the facts necessary to prove either that the product is in a “condition . . . not contemplated by reasonable” users or consumers under Indiana Code section 34-20-4-1(1)²⁵⁷ or that the injury resulted from “handling, preparation for use, or consumption that is not reasonably expectable” under Indiana Code section 34-20-4-3.²⁵⁸

253. IND. CODE § 34-20-6-3 (2004).

254. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999) (citing *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 939 (Ind. Ct. App. 1994)).

255. *Vaughn v. Daniels Co. (W. Va.), Inc.*, 841 N.E.2d 1133, 1146 (Ind. 2006) (“Incurred risk acts as a complete bar to liability with respect to negligence claims brought under the [I]PLA.” (citing IND. CODE §§ 34-51-2-1 to -19). On that point, the *Vaughn* decision is consistent with several earlier cases, including *Baker v. Heye-America*, 799 N.E.2d 1135, 1145 (Ind. Ct. App. 2003), *Hopper v. Carey*, 716 N.E.2d 566, 575 (Ind. Ct. App. 1999), and *Cole*, 714 N.E.2d at 194, all of which stated that incurred risk is a complete defense in Indiana. Cf. *Mesman v. Crane Pro Servs.*, 409 F.3d 846 (7th Cir. 2005); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2004). Although it held that no IPLA-based claims survived summary judgment, the *Vaughn* court did allow a common law negligence claim to proceed against Daniels and, accordingly, allowed the issue of Vaughn’s fault to remain in the case for the jury’s consideration solely in connection with the negligence claim. *Vaughn*, 841 N.E.2d at 1145-46. For a discussion about the nature of the negligence claim that the court allowed to survive summary judgment, see *Alberts & Petersen*, *supra* note 103, at 1037-39.

256. IND. CODE § 34-20-6-4 (2004). Stated in a slightly different way, misuse is a “use for a purpose or in a manner not foreseeable by the manufacturer.” *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005) (quoting *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003)).

257. IND. CODE § 34-20-4-1(1) (2004).

258. *Id.* § 34-20-4-3.

Recent decisions in cases such as *Barnard v. Saturn Corp.*²⁵⁹ and *Burt v. Makita USA, Inc.*²⁶⁰ have resolved the applicability of the misuse defense as a matter of law. On the other hand, a 2005 case, *Henderson v. Freightliner, LLC*,²⁶¹ held that the incurred risk issue should be presented to a jury.²⁶² Although the *Vaughn* case involved the court's resolution of a "misuse" issue, the court addressed plaintiff's purported "misuse" not as an IPLA-based defense to a product liability claim, but rather as an element of the jury's consideration in connection with Vaughn's common law negligence claim.²⁶³

The statutory definition of "misuse" quoted above appears to consider only

259. 790 N.E.2d 1023 (Ind. Ct. App. 2003). *Barnard* was a wrongful death action against the manufacturers of an automobile and its lift jack. *Id.* at 1026-27. Plaintiff's decedent was killed when he used a lift jack to prop up his vehicle while he changed the oil. *Id.* at 1027. The jack gave way, trapping the decedent underneath the car. *Id.* Both manufacturers provided safety warnings regarding proper use of the jack that the decedent did not follow. *Id.* at 1026-27. For example, the decedent failed to block the tires while he used the jack, he used the jack when the vehicle was not on a flat surface, and he got underneath his vehicle while it was raised on the jack—all of these actions were contrary to the warnings provided by the manufacturers. *Id.* at 1030. The trial court granted summary judgment to the defendants based upon product misuse, and the Estate appealed. *Id.* at 1025. The *Barnard* court ultimately affirmed the grant of summary judgment, holding as a matter of law that "no reasonable trier of fact could find that [the decedent] was less than fifty percent at fault for the injuries that he sustained." *Id.* at 1031. As such, the resolution of the case by the *Barnard* court was practically identical to how the court in *Coffman* resolved an incurred risk question. For a more detailed analysis of *Barnard*, see Alberts & Bria, *supra* note 108, at 1286-87.

260. 212 F. Supp. 2d 893 (N.D. Ind. 2002). In *Burt*, the plaintiff was injured by a circular saw's blade guard. *Id.* at 894. The district court held that there was

no evidence that the defendants should have foreseen that someone would leave the blade guard in an incompletely installed position, or that someone would attempt to use the saw with the blade guard improperly attached. To the contrary, the evidence suggest[ed] that the accident was unforeseeable, caused by a very unusual set of factual circumstances.

Id. at 898. Accordingly, the defendants were not liable because the manner in which the injury occurred was not reasonably foreseeable as a matter of law. *Id.* That being the case, the statutory definition in Indiana Code section 34-20-4-1(1) had not been met, which necessarily also meant that the defense of "misuse" had been established as a matter of law. *Id.*; see also Alberts & Boyers, *supra* note 23, at 1195-96.

261. No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832 (S.D. Ind. Mar. 24, 2005).

262. In *Henderson*, defendants argued that plaintiff Henderson began working on a diesel truck's air suspension system without first bleeding the air pressure, which was a misuse because the truck's service manual required that mechanics, among other things, "disconnect the leveling valve and exhaust all air from the air springs." *Id.* at *5, *10. Judge Hamilton decided that the disputed issues of fact noted above precluded him from granting summary judgment that the misuse defense foreclosed recovery as a matter of law. *Id.* at *10-14.

263. *Vaughn v. Daniels Co. (W. Va., Inc.)*, 841 N.E.2d 1133, 1145-46 (Ind. 2006). For a more detailed discussion about the negligence claim that the *Vaughn* court allowed to survive against Daniels, see Alberts & Petersen, *supra* note 103, at 1037-39.

the objective reasonableness of the foreseeability of the misuse by the seller and not the character of the misuser's conduct. That would seem to confirm that "misuse" should not be considered "fault" and, therefore, misuse should be a complete defense as is incurred risk.²⁶⁴ Recent decisions, however, continue to reach inconsistent results when it comes to that issue. Three decisions, *Burt v. Makita USA, Inc.*,²⁶⁵ *Morgen v. Ford Motor Co.*,²⁶⁶ and *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*,²⁶⁷ have concluded that misuse is a complete defense. On the other hand, decisions in cases such as *Chapman v. Maytag Corp.*²⁶⁸ and *Barnard v. Saturn Corp.*²⁶⁹ have determined that the degree of a user's or a consumer's misuse is a factor to be assessed in determining that user's or consumer's "fault," which must then be compared with the "fault" of the alleged tortfeasor(s).²⁷⁰

There were no significant published decisions during the survey period that addressed misuse.

C. Modification and Alteration

Indiana Code section 34-20-6-5 provides:

It is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product's delivery to the initial user or consumer if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.²⁷¹

264. The district judge in *Chapman v. Maytag Corp.*, 297 F.3d 682 (7th Cir. 2002), recognized as much. He also recognized that the Indiana General Assembly did not specifically exempt misuse from the scope of the comparative fault requirement. *Id.* at 689.

265. 212 F. Supp. 2d 893, 897 (N.D. Ind. 2002).

266. 762 N.E.2d 137, 143 (Ind. Ct. App. 2002), *aff'd in part, vacated in part*, 797 N.E.2d 1146 (Ind. 2003).

267. 709 N.E.2d 1070, 1072 (Ind. Ct. App. 1999).

268. 297 F.3d 682 (7th Cir. 2002). In *Henderson*, Judge Hamilton cited *Chapman* for the proposition that "[t]he misuse defense is not necessarily a complete defense but is an element of comparative fault." *Henderson v. Freightliner, LLC*, NO. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at *10 (S.D. Ind. Mar. 24, 2005) (citing *Chapman*, 297 F.3d at 689). For a more detailed analysis of *Chapman*, see Alberts & Boyers, *supra* note 23, at 1196-97.

269. 790 N.E.2d 1023 (Ind. Ct. App. 2003). According to the *Barnard* court, "the defense of misuse should be compared with all other fault in a case and does not act as a complete bar to recovery in a products liability action." *Id.* at 1029 (citing *Chapman*, 297 F.3d at 689). The *Barnard* court determined that the 1995 Amendments to the IPLA required all fault in cases to be comparatively assessed. *Id.* at 1029-30. "By specifically directing that the jury compare all 'fault' in a case, we believe that the legislature intended the defense of misuse to be included in the comparative fault scheme." *Id.* at 1030; *see also* Alberts & Bria, *supra* note 108, at 1286-87.

270. *See* IND. CODE § 34-20-8-1 (2004).

271. *Id.* § 34-20-6-5. Before the 1995 Amendments to the IPLA, product modification or

The modification/alteration defense is incorporated into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1. Indeed, the Indiana Code provides:

[A] person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if . . . the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.²⁷²

The interplay between these two statutes as it relates to a product's condition is important for courts and practitioners to understand. As briefly discussed above in Part I.D.1., evidence of a product's condition after leaving the manufacturer's or seller's control is significant *both* as an IPLA-mandated threshold requirement for which the plaintiff bears the burden of proof, as well as an IPLA-based affirmative defense for which the defendant bears the burden of proof.²⁷³

In a product liability case in Indiana, the IPLA requires the plaintiff, in order to establish his or her prima facie case, to demonstrate, first, that the product was in a defective condition at the time the seller or manufacturer conveyed it to another party,²⁷⁴ and, second, that the product reached him or her "without substantial alteration."²⁷⁵ If a plaintiff's evidence is insufficient to meet those requirements as a matter of law either before or at trial, he or she has failed to

alteration operated as a complete defense. See *Foley v. Case Corp.*, 884 F. Supp. 313, 315 (S.D. Ind. 1994).

272. IND. CODE § 34-20-2-1 (2004).

273. *Gaskin v. Sharp Electronics, Corp.*, No 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007), addressed above in Part I.D.1. in connection with manufacturing defect allegations, briefly addressed the "alteration" defense. Recall that *Gaskin* involved allegations that a television caused a fatal house fire. *Id.* at *2. The court recognized that plaintiffs had to prove that the allegedly defective condition in the television at issue existed at the time it left the manufacturer's control in order to satisfy an essential element of their prima facie case. *Id.* at *22. Whether there was a substantial alteration in the television between the time when it left the manufacturer's control and the time when it came into the plaintiff's possession, according to the court, was an affirmative defense to the foregoing essential element of the plaintiff's prima facie case. *Id.* at *23. The plaintiffs in *Gaskin* pointed to evidence that the television was purchased only two months prior to the fire, it was purchased from Best Buy in pristine condition, it was not mishandled by anyone, and it was never in need of repair. *Id.* at *24. Accordingly, the court concluded that there was sufficient evidence to allow the jury to ultimately determine whether plaintiffs could satisfy their burden of establishing a prima facie case and whether defendants could satisfy their burden of demonstrating the existence of a substantial alteration. *Id.*

274. IND. CODE. § 34-20-4-1 (2004).

275. *Id.* § 34-20-2-1.

establish a prima facie product liability case.

The defendant, on the other hand, can and should introduce evidence to establish either that the product was substantially altered before it reached the plaintiff or that it was substantially modified or altered after delivery to the initial user or consumer and such modification or alteration proximately caused the damages alleged. Establishing the former negates a prima facie component of plaintiff's case. Establishing the latter provides the basis for the statutory modification/alteration defense. In many cases, the same evidence will prove both points, such as a situation in which the initial user or consumer substantially altered the product before selling it to the plaintiff.

V. COMPARATIVE FAULT AND THE IPLA

The IPLA incorporates, in large measure, Indiana's comparative fault principles for all product liability actions. A defendant cannot be "liable for more than the amount of fault . . . directly attributable to that defendant," nor can a defendant "be held jointly liable for damages attributable to the fault of another defendant."²⁷⁶ In addition, the IPLA requires the trier of fact to compare the "fault of the person suffering the physical harm, as well as the fault of all others whom caused or contributed to cause the harm."²⁷⁷ For purposes of the IPLA, "fault" is

an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following:

- (1) Unreasonable failure to avoid an injury or to mitigate damages.
- (2) A finding under [Indiana Code section] 34-20-2 . . . that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.²⁷⁸

The IPLA also contemplates assessment of fault for non-parties:

In assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm.²⁷⁹

In *Dorman v. Osmose, Inc.*,²⁸⁰ plaintiff Dorman was wearing shorts while "building a deck with lumber treated with chromated copper arsenate ("CCA"), a preservative and pesticide manufactured by Osmose."²⁸¹ "[H]e accidentally

276. *Id.* § 34-20-7-1.

277. *Id.* § 34-20-8-1(a).

278. *Id.* § 34-6-2-45(a).

279. *Id.* § 34-20-8-1(b).

280. 873 N.E.2d 1102 (Ind. Ct. App. 2007).

281. *Id.* at 1105.

struck his leg against a piece of freshly cut wood, and several splinters lodged in his right shin.”²⁸² As a result of his injuries, Dorman sued Osmose, “alleging negligence and strict liability.”²⁸³ Osmose filed its answer, alleging, among other things, that Dorman was contributorily negligent.²⁸⁴ The case went to trial in 2006.²⁸⁵ At the close of trial, the court gave final instructions to the jury, including the following instructions, quoted in relevant part, concerning contributory negligence and fault apportionment:

[Osmose] contends that the [Dormans'] damages and injuries were caused by the negligence of [p]laintiff, Mark Dorman. Contributory negligence is the failure of a [p]laintiff to use reasonable care, when that failure contributes to the loss [p]laintiff claims and is a proximate cause of such loss. [Osmose] has the burden to prove by a preponderance of the evidence that [p]laintiff, Mark Dorman, was negligent.

...

Next, if [Osmose] is not at fault or if [p]laintiff Mark Dorman's fault is greater than 50 percent, then you must return your verdict for [Osmose] and against the [Dormans]; and no further deliberation is required.²⁸⁶

The jury returned a verdict in favor of Osmose.²⁸⁷

Part of the Dormans' appeal contended that the trial court abused its discretion by tendering the foregoing contributory negligence and fault apportionment instructions.²⁸⁸ “Specifically, the Dormans argue[d] that because Osmose claimed that its product was not dangerous and did not provide a warning to wear long pants when working with CCA-treated wood, [Dorman could not] be contributorily negligent for not taking precautions to avoid splinters from wood treated with CCA.”²⁸⁹ Osmose responded that there was evidence in the record showing that “any type of wood splinter could have caused [Dorman's] injuries” and that Dorman failed to wear long pants even though he knew that he should wear long pants to avoid splinters.²⁹⁰

The court agreed with Osmose that the evidence supported the instruction.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 1109-10.

287. *Id.* at 1106.

288. *Id.* at 1109. The case has an involved procedural history, including a previous appeal. *Id.* at 1105. In addition to the comparative fault issue, Dorman raised two other issues on appeal, one involving the trial court's decision not to replace one of the jurors at trial and the other involving the trial court's denial of Osmose's motion to admit certain language from a brief submitted in a prior appeal. *Id.* at 1104.

289. *Id.* at 1110.

290. *Id.*

Quoting *Peavler v. Board of Commissioners*,²⁹¹ the *Dorman* court wrote that “[c]ontributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection” and that “the plaintiff’s negligence must either be the proximate cause or a concurring or co-operating proximate cause of the plaintiff’s injury.”²⁹² Further citing to section 466 of the 1965 version of the Restatement (Second) Torts, the *Dorman* court identified two types of contributory negligence:

(a) an intentional and unreasonable exposure of himself to danger created by the defendant’s negligence, of which danger the plaintiff knows or has reason to know, or

(b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm.²⁹³

According to the court, the evidence presented “a situation that fits squarely into paragraph (b).”²⁹⁴ In doing so, the *Dorman* court cited, again, to *Peavler*, placing the following quotation in parentheses: “It is sufficient if the injury resulting from [plaintiff’s] failure to exercise ordinary care is such as was usual and therefore might have been expected.”²⁹⁵ The court pointed to testimony by physicians to the effect that foreign objects in the skin can cause cellulitis, that “wood splinter[s] of any kind . . . can cause acute infections such as that experienced by [Dorman],” and that there were not any known, published reports demonstrating “that a CCA-treated splinter is somehow different in terms of its toxic potential than [sic] is an untreated wood splinter.”²⁹⁶ The court also noted that Dorman “testified that he had worked with pressure treated wood eighty or ninety times beginning in high school,”²⁹⁷ “that he had been taught to keep his arms and legs covered while working with wood to protect against splinters,”²⁹⁸ and that he had both been admonished for, and prohibited from, wearing shorts while working at what the court inferred to be a construction job at Indiana University.²⁹⁹ The court, therefore, concluded that evidence in the record supported a contributory negligence jury instruction.³⁰⁰

The fault apportionment instruction appears to be perfectly consistent with both the IPLA and the Comparative Fault Act. The same does not seem to be

291. 557 N.E.2d 1077, 1080 (Ind. Ct. App. 1990).

292. *Dorman*, 873 N.E.2d at 1110.

293. *Id.* at 1111.

294. *Id.*

295. *Id.* (alteration in original) (quoting *Peavler*, 557 N.E.2d at 1081).

296. *Id.* at 1110.

297. *Id.*

298. *Id.* at 1110-11.

299. *Id.* at 1111.

300. *Id.*

true for the contributory negligence instruction. Although the appellate panel in *Dorman* determined that evidence of record supported the contributory negligence instruction, the cautionary tale here for practitioners is that such an instruction does not seem to be readily applicable to a product liability case accruing, as *Dorman*'s did, after the Indiana General Assembly specifically incorporated Indiana's comparative fault principles into the IPLA. The accident that resulted in *Dorman*'s injuries occurred on June 23, 1996,³⁰¹ well after the June 30, 1995 effective "accrual" date for applicability of the 1995 amendments that specifically incorporated Indiana's comparative fault principles into the IPLA.³⁰² The two principal authorities cited by the *Dorman* panel, *Peavler* and the Restatement (Second) of Torts, preceded the 1995 IPLA amendments that incorporated comparative fault principles into the IPLA.

Because the action did not involve an entity to which traditional notions of contributory negligence would still apply,³⁰³ use of the terms "comparative" and "fault" both appear more consistent with the IPLA than do the terms "contributory" and "negligence." Indeed, as Indiana courts have recognized, "common law characterizations of [a plaintiff's] conduct as contributorily negligent as a matter of law mean little in the context of comparative fault other than that [the plaintiff] must be assessed some portion of his damages."³⁰⁴ Use of the term "fault" as opposed to "negligence" also appears more appropriate because, as noted above, the current IPLA defines "fault" by employing different terms than does the contributory negligence instruction.

VI. FEDERAL PREEMPTION

"[F]ederal law preempts state law in three situations: (1) when the federal statute explicitly provides for preemption; (2) when Congress intends to occupy the field completely; and (3) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress."³⁰⁵

301. *Id.* at 1105.

302. Act of Apr. 26, 1995, No. 278, § 7, 1995 Ind. Acts 4051, 4055-56.

303. The contributory fault doctrine in Indiana precludes recovery by a plaintiff if his or her action or inaction contributed in any way to causing the alleged damages. Comparative fault, on the other hand, is a mechanism by which juries assign percentages of fault among all parties and non-parties, including plaintiffs. *See generally* IND. CODE § 34-51-2-7(b) (2004); *see also* *Booker, Inc. v. Morrill*, 639 N.E.2d 358 (Ind. Ct. App. 1994) ("A comparative fault statute . . . reflects a legislative determination that fairness is best achieved by a relative assessment of the parties' respective conduct" (citing *Robbins v. McCarthy*, 581 N.E.2d 929, 932 (1991))). Under Indiana's current comparative fault scheme, a plaintiff's recovery will be precluded only if his or her fault exceeds fifty percent. IND. CODE § 34-51-2-6 (2004). Traditional notions of contributory fault remain applicable in Indiana only in the context of tort claims against governmental entities or public employees. *Id.* § 34-51-2-2.

304. *Robbins v. McCarthy*, 581 N.E.2d 929, 934 (Ind. Ct. App. 1991).

305. *Thornburg v. Stryker Corp.*, No. 1:05-cv-1378-RLY-TAB, 2007 U.S. Dist. LEXIS 43455,

*Thornburg v. Stryker Corp.*³⁰⁶ determined whether the Food, Drug, and Cosmetic Act's ("FDCA") Medical Device Amendments ("MDA") preempted state law product liability claims against the manufacturer of a hip replacement device.³⁰⁷ In that case, the plaintiff alleged that the hip replacement manufacturer "designed, promoted, marketed, manufactured, assembled and sold" the defective hip replacement system and components at issue.³⁰⁸ The defendant moved for summary judgment, arguing that the claims were preempted.³⁰⁹

The manufacturer had applied for FDA approval pursuant to the FDA's pre-market approval process, and as part of that process, provided supporting data to the FDA concerning the hip device at issue.³¹⁰ The allegedly defective device received FDA approval, which allowed the manufacturer to sell it commercially within the United States under FDA-imposed conditions.³¹¹ The manufacturer did not alter the FDA-approved design, manufacturing process, or labeling without approval.³¹²

The trial court determined that the claims at issue were preempted, recognizing that the MDA contains an express provision that provides as follows:

Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement –

- (1) which is different from, or in addition to, any requirement applicable under this Act to the device, and
- (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this Act.³¹³

The court cited to a Seventh Circuit Court of Appeals holding that the preemption provision required establishment of the following things as a condition precedent to preemption:

- (1) a requirement that a state establish[es] or continue[s] in effect, with respect to a device intended for human use; (2) a relevant federal requirement under the FDCA applicable to the device at issue; and (3) a state requirement that is different from or in addition to the federal

*5 (S.D. Ind. July 3, 2007) (quoting *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 918 (7th Cir. 2007)).

306. *Thornburg*, 2007 U.S. Dist. LEXIS 43455.

307. *Id.* at *1-4.

308. *Id.* at *1.

309. *Id.* at *2.

310. *Id.* at *4.

311. *Id.*

312. *Id.*

313. 21 U.S.C. § 360k(a) (2000).

requirement.³¹⁴

The *Thornburg* court easily concluded that the first two conditions had been established. The IPLA satisfied the first condition because it governs all actions that are brought by a user or consumer of a product against the manufacturer or seller of products that cause injury or harm.³¹⁵ The MDA provided the “relevant federal requirement under the FDCA.”³¹⁶

According to the court, the third condition merited more treatment. With regard to that third condition, the court wrote:

[I]f a state law parallels a federal law requirement then federal law cannot preempt such state law. “In order for a state requirement to be parallel to a federal requirement . . . [Thornburg] must show that the requirements are genuinely equivalent. State and federal requirements are not genuinely equivalent if a manufacturer could be held liable under the state law without having violated the federal law.”³¹⁷

The court ultimately concluded that the IPLA and the FDCA requirements were not equivalent because a manufacturer could be held liable under state law without having violated federal law.³¹⁸

CONCLUSION

Even though more than a decade has passed since the Indiana General

314. *Thornburg*, 2007 U.S. Dist. LEXIS 43455, at *6 (alterations in original) (citing *McMullen v. Medtronic, Inc.*, 421 F.3d 482, 487 (7th Cir. 2005)).

315. *Id.* (citing IND. CODE § 34-20-1-1 (2004)).

316. *Id.*

317. *Id.* at *6-7 (citation omitted) (alteration in original) (quoting *McMullen*, 421 F.3d at 488). The plaintiff argued “that preemption is not appropriate ‘under a strong presumption against preemption,’” and she relied solely on a U.S. Supreme Court case, *Medtronic v. Lohr*. *Id.* at *7 (citing *Medtronic v. Lohr*, 518 U.S. 470 (1996)). In *Lohr*, the U.S. Supreme Court assessed preemption under the FDA’s pre-market approval process 21 U.S.C. § 510(k), which requires “a significantly shorter review process” than the section at issue (21 U.S.C. § 360(e)) and is available only to medical devices that are substantially similar to devices currently on the market. *Id.* at *7-8. The district court held that plaintiffs’ reliance upon *Lohr* was misplaced because the application process for the product in question (21 U.S.C. § 360(e)) imposed standards far more rigorous than those at issue in *Lohr*. *Id.*

318. *Id.* at *9. The court noted that *Thornburg* failed to assert the only claim that would *not* be preempted—that Stryker “failed to ‘conform with the *FDA requirements* prescribed by the [pre-market approval].” *Id.* at *8 (quoting *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 455 F. Supp. 2d 709, 716-17 (N.D. Ohio 2006) (emphasis added)). All three of the aforementioned factors were satisfied and *Thornburg*’s state law claims were, therefore, preempted in their entirety. *Id.* The court remarked that “the prevailing majority view among courts which have assessed preemption involving a § 360(e) review of medical devices is that federal law preempts state claims similar to *Thornburg*’s.” *Id.* at *8 (citing *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 455 F. Supp. 2d at 716-17).

Assembly made sweeping revisions to the IPLA in 1995, the 2007 survey period marked another busy, productive year both for judges interpreting Indiana product liability law and for lawyers helping to shape and guide it.

SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

GREG N. ANDERSON*

I. RE-EXAMINATION OF REGULATED ATTORNEY'S FEES

In this past year, the Indiana Supreme Court reconsidered its analysis of attorney's fees in medical malpractice cases in *In re Stephens*.¹ Prior to this reconsideration, the court looked at the issue in a 2006 decision that stated that the lawyer in *Stephens* took an unreasonable fee in a medical malpractice case.² After the court made its decision in *Stephens I*, the Indiana Trial Lawyers Association ("ITLA") asked the court to reconsider its decision in a motion for leave to intervene, which the court granted. ITLA's motion to intervene led to the court's 2007 decision in *Stephens*.³

The issue that ITLA wanted the court to reconsider in *Stephens II* is whether a lawyer representing a client in a medical malpractice case is permitted to use a sliding-scale method of calculating fees without violating the Indiana Rules of Professional Conduct ("Rule" or "Rules"). The Indiana Medical Malpractice Act⁴ ("Medical Malpractice Act"), which applies to acts of malpractice that did not occur before July 1, 1975,⁵ limits a plaintiff's recovery to \$1,250,000 for an occurrence of malpractice after June 30, 1999.⁶ A qualified health care provider's liability under the Medical Malpractice Act is limited to the amount of \$250,000.⁷ If the plaintiff receives a judgment or settlement in excess of the limitation on a qualified health care provider's liability, the plaintiff can recover the excess amount from the Patient Compensation Fund ("Fund").⁸ Because of the limitations on the plaintiff's recovery, the Medical Malpractice Act limits attorney's fees for a recovery from the Fund to 15%.⁹ However, the Medical Malpractice Act does not put a limitation on attorney's fees from the portion of recovery from the qualified health care provider.¹⁰

After the Indiana legislature adopted the Medical Malpractice Act, many medical malpractice lawyers began using a sliding-scale method of calculating their fees so that they could receive a combined fee from both the health care

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1. 867 N.E.2d 148 (Ind. 2007).

2. 851 N.E.2d 1256 (Ind. 2006) (*Stephens I*).

3. 867 N.E.2d 148 (Ind. 2007) (*Stephens II*).

4. See IND. CODE §§ 34-18-1-1 to -10-10 (2004).

5. *Id.* § 34-18-1-1.

6. *Id.* § 34-18-14-3(a)(3). Before July 1, 1999, the plaintiff's recovery was limited to \$750,000. *Id.*

7. *Id.* § 34-18-14-3(b). Before July 1, 1999, a qualified health care provider's liability was limited to \$100,000. *Id.*

8. *Id.* § 34-18-14-3(c).

9. *Id.* § 34-18-18-1.

10. See also *In re Stephens* (*Stephens I*), 851 N.E.2d 1256, 1257 (Ind. 2006).

provider's portion of recovery and the Fund that would result in a 35% total fee. Medical malpractice lawyers calculated this sliding-scale fee by taking 15% from the Fund portion of recovery and a percentage from the health care provider portion, which could potentially include 100% of the health care provider portion, to make the total fee equal to 35%.¹¹ In *Stephens*, the Commission took the position that this type of sliding scale fee arrangement violated Rule 1.5(a)¹² because the Commission argued that the fee on the recovery from the health care provider should be limited to a reasonable fee.¹³

As it began, the *Stephens* case was a non-descript fee case in which the respondent was charged with various violations of the Rules for his fee arrangement in a medical malpractice case.¹⁴ In May 2001, the respondent entered into a fee agreement with his client, in which they agreed that the respondent's fees would be calculated using a sliding-scale fee arrangement:

The law limits the Attorneys' fees to 15% of all sums recovered from the Patient Compensation Fund, though it does not restrict the amount of fees taken from the first \$100,000 of any recovery from the health care providers. The Client(s) agree to pay to the attorneys as much of the first \$100,000 obtained from the health care providers as is necessary to equal one-third of the total recovery.¹⁵

In *Stephens I*, the court held that the respondent violated Rule 1.5(a) by attempting to circumvent the Medical Malpractice Act's limitation on attorney's

11. *In re Stephens (Stephens II)*, 867 N.E.2d 148, 154 (Ind. 2007).

12. IND. PROF. CONDUCT R. 1.5(a) provides:

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

13. *Stephens II*, 867 N.E.2d at 151-52.

14. *Stephens I*, 851 N.E.2d at 1257-58. The court in *Stephens I* found two violations of Rule 1.5(a) by the respondent by attempting to circumvent the Medical Malpractice Act's limitation on attorney fees and by having a non-refundable retainer provision in his contract with his client. *Id.* at 1258. The court in *Stephens I* also found the respondent violated Rule 1.8(a) by renegotiating his fee agreement with his client in an improper manner. *Id.*

15. *Id.* at 1257.

fees from the Fund.¹⁶ The court reasoned:

As noted in respondent's fee agreement, the medical malpractice statutes of this state limit a plaintiff's attorney's fees to fifteen percent (15%) of any recovery from the Patient Compensation Fund. Respondent's fee agreement also suggested that there was no restriction on the amount of fees taken from the first \$100,000 recovered from a health care provider. ([Indiana Code section] 34-18-14-3 limited the liability of qualified healthcare providers to \$100,000. This limitation has now been increased to \$250,000). To avoid the 15% cap on recoveries over \$100,000, respondent's agreement required that he receive from the first \$100,000 recovered a fee equal to one-third of the total recovery (healthcare provider contribution plus Patient Compensation Fund contribution). This had the potential of resulting in the entire first \$100,000 recovered going to respondent.

While the medical malpractice statutes do not restrict the amount of attorney fees taken from the first \$100,000 recovered, our Rules of Professional Conduct do set standards for attorney fees. Respondent's agreement violated Ind[iana] Professional Conduct Rule 1.5(a), which requires that a lawyer's fee shall be reasonable. An attempt to circumvent the statute limiting the recovery allowed from the Fund is not proper. The limitation on fees imposed by [Indiana Code section] 34-18-18-1 cannot be overcome by merely manipulating the source of the fees. Regardless of the source of the fee, an attorney's compensation must still meet the reasonableness requirements of [Rule] 1.5(a) and the 15% limitation of [Indiana Code section] 34-18-18-1.¹⁷

The court concluded in *Stephens I* that fees in medical malpractice cases must meet the reasonableness requirements of Rule 1.5(a) and the 15% limitation under the Medical Malpractice Act.¹⁸ This conclusion is consistent with its other decisions involving reasonable fees when the fees are regulated by statute.¹⁹

The *Stephens I* court looked to its reasoning in *In re Benjamin*²⁰ as support for its opinion that the sliding-scale fee arrangement is unreasonable under Rule 1.5(a). In *Benjamin*, the lawyer represented a client in a medical malpractice case. The lawyer inherited this medical malpractice case from a former partner of his firm and, along with the case, inherited the fee agreement.²¹ This written fee agreement called for the lawyer to receive "40% of total recovery not to

16. *Id.* at 1257-58.

17. *Id.* (citations omitted).

18. *Id.*

19. See *In re Geller*, 777 N.E.2d 1099, 1099 (Ind. 2002) (holding that attorney's fees are unreasonable when the fees exceed the amount permitted under the regulations of the worker's compensation act); *In re Maley*, 674 N.E.2d 544, 546 (Ind. 1996) (same).

20. 718 N.E.2d 1111 (Ind. 1999), overruled by *In re Stephens (Stephens II)*, 867 N.E.2d 148 (Ind. 2007).

21. *Id.* at 1112.

exceed attorney fee of 200,00 (sic).”²² In the summer of 1995, the client settled with the medical provider wherein the medical provider would pay its maximum liability of \$100,000 under the Medical Malpractice Act in a structured settlement with an initial payment of \$50,000 and the remaining \$50,000 to be paid over a period of years.²³ The lawyer in *Benjamin* took 40% from the gross settlement of \$100,000 when he received payment of the \$50,000 from the medical provider.²⁴

After settling with the medical provider for the full amount of the medical provider's liability under the Medical Malpractice Act, the client in *Benjamin* was then allowed to file a petition with the Fund to recover damages in excess of those for which the medical provider was liable.²⁵ In January 1996, the client settled with the Fund for the amount of \$335,000.²⁶ After he received the settlement check, the lawyer in *Benjamin* retained 40% of the recovery from the Fund as his fee.²⁷ Under the 15% fee limitation for lawyers under the Medical Malpractice Act, the lawyer was entitled to a fee of \$50,250.²⁸

The client in *Benjamin* challenged the lawyer's fee of 40% of the recovery from the Fund and requested that the lawyer retain only 15% of the Fund portion.²⁹ The lawyer in *Benjamin* proposed to reduce his fee by using a sliding-scale fee arrangement set out by the former partner under which the lawyer would receive 100% of the medical provider's portion of the settlement and 15% of the Fund portion.³⁰ Under the sliding-scale fee calculation, the lawyer in *Benjamin* would have received a total of \$150,250 as his total fee or 34.5% of the total recovery.³¹ The client rejected the lawyer's offer to reduce the fee in this manner.³²

Citing *In re Maley*,³³ the *Benjamin* court held that the lawyer's fee agreement, which called for fees in excess of the limits on lawyer's fees regulated by other law, was unreasonable under Rule 1.5(a).³⁴ Beyond its narrow

22. *Id.*

23. *Id.*

24. *Id.* The court in the *Benjamin* case found that the respondent violated Rule 1.5(a) by retaining his full fee of forty percent (40%) of the gross settlement of \$100,000 from the first payment of \$50,000 from the medical provider. *Id.* at 1113.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* The court held that the lawyer in *Benjamin* violated Rule 1.5(a) by charging an unreasonable fee in excess of the 15% limit on lawyer's fees from the Fund under the Indiana Medical Malpractice Act. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1112.

33. 674 N.E.2d 544, 546 (Ind. 1996) (holding fees in excess of those permitted by the worker's compensation regulations are unreasonable under Rule 1.5(a)).

34. *In re Benjamin*, 718 N.E.2d at 1112-13.

holding that attorney's fees in excess of regulated limits are unreasonable, the court took time to express its displeasure at the proposed sliding-scale method of calculating fees that the lawyer in *Benjamin* offered to his client to reduce his fees.³⁵ In dicta, the court criticized this method of calculating fees:

[T]he respondent [in *Benjamin*] attempted to retain as his fee \$100,000 of the \$100,000 settlement from the defendant hospital [medical provider], in addition to 15% of the recovery from the Indiana Patient Compensation Fund. We find that approach to be an attempt to circumvent the statute limiting the recovery allowed from the Fund. By retaining as his fee an unreasonable portion of the recovery from the settlement with the hospital [medical provider], the respondent would have effectively offset the 15% limitation on his fee from the Fund recovery.³⁶

In *Maley*, the respondent represented a client in a worker's compensation case.³⁷ Attorney's fees in worker's compensation cases, like medical malpractice cases, are regulated.³⁸ However, in worker's compensation cases, the lawyer's fees are regulated, not by statute, but by the Indiana Administrative Code.³⁹ The Worker's Compensation Board, at the time that the lawyer in *Maley* entered into his contract with his client, limited lawyer's fees in worker's compensation cases to the following schedule:

A minimum of \$100.00 and upon the first \$10,000.00 of the recovery, 20%; on the second \$10,000.00 of the recovery, 15%; and 10% upon all recovery in excess of \$20,000.00. Provided, however, the board maintains continuing jurisdiction over all attorney fees in cases before the board and the board may order a different attorney fee schedule or allowance in a proper case.⁴⁰

The respondent negotiated a contract with his client in her worker's compensation case in which she agreed to pay:

a sum of money equal to thirty-three and one-third percent (33 1/3%) prior to filing suit of all sums received; forty percent (40%) of all sums so received after suit is filed; and fifty percent (50%) of all sums so received if a change of venue is taken after suit. In the event an appeal is necessary, the parties will negotiate an additional agreement based on such matters as the size of the judgment, interest payable on it, etc.

It is presently contemplated by the parties that this matter will be

35. *Id.* at 1113.

36. *Id.* at 1113 n.2.

37. 674 N.E.2d 544 (Ind. 1996).

38. IND. CODE § 22-3-4-12 (2007).

39. 631 IND. ADMIN. CODE 1-1-25 (West 2006).

40. 631 IND. ADMIN. CODE 1-1-24 (1996), *expired*, IND. CODE § 4-22-2.5 (2005).

disposed of through the offices of the Workman's Compensation Act and if such is the case, the [client] agreed to pay the [respondent] as attorney's fees [an amount] equal to thirty-three and one-third percent (33 1/3%) of the amounts so recovered through a Board hearing, forty percent (40%) if the matter is appealed to the Court of Appeals, and fifty percent (50%) if the matter is then appealed to the Indiana Supreme Court. This agreement is made in recognition of the fact that the case is extremely complicated and involves necessary attorney time in excess of the typical case.⁴¹

After a hearing before a single member of the Worker's Compensation Board, the client was awarded a recovery of \$89,000, and the lawyer in *Maley* was awarded a fee based on the regulations of the Worker's Compensation Board in the amount of \$10,500.⁴² The lawyer in *Maley* filed a petition for fees with the full board in which he requested fees in the amount of 33 1/3% of the recovery.⁴³ The full board denied the lawyer's request and upheld the fee awarded by the single hearing member. When the lawyer in *Maley* received a check for his client in the amount of \$34,354, the lawyer kept \$27,000 as his fee for his work on his client's worker's compensation case.⁴⁴

The court in *Maley* held that the lawyer's fee was excessive and violated Rule 1.5(a) by exceeding the presumptive limits for attorney's fees under the regulations of the Worker's Compensation Board.⁴⁵ The court cited civil cases from Indiana as well as other states to support its position:

This Court has held that agreements calling for attorney fees beyond the schedule set by the Industrial Board are void or unenforceable. Other jurisdictions have found professional misconduct where lawyers charge fees in excess of that allowed under comparable worker's compensation awards or schedules

In the present case, the respondent elected to retain attorney fees in excess of the presumptive limits contained in 631 I.A.C. 1-1-24. He did so without advising the client the fee agreement was unenforceable under governing precedents. Although the Worker's Compensation Board is empowered to consider applications for additional attorney fees, no such application was granted to the respondent. In fact, the respondent retained a fee substantially in excess of the presumptive limits despite the full board's express upholding of the single hearing member's initial fee award pursuant to the applicable limits. Further, he did so despite his client's unwillingness to pursue modification of the fee award. We therefore conclude that the respondent's fee was

41. *In re Maley*, 674 N.E.2d at 545.

42. *Id.* at 545-46.

43. *Id.*

44. *Id.*

45. *Id.*

unreasonable and thus that he violated [Rule] 1.5(a).⁴⁶

The *Maley* court found that a lawyer could not substitute his own fee structure for the regulated structure without running afoul of his ethical duties under the Rules to refrain from charging unreasonable fees.⁴⁷

Under the precedents of *Maley* and *Benjamin*, the *Stephens I* court had found that lawyer's fees in excess of regulated limitations were unreasonable fees in violation of Rule 1.5(a).⁴⁸ Furthermore, the court has also criticized the sliding-scale method of calculating fees in medical malpractice cases, viewing it as an "attempt to circumvent" the statutory scheme limiting lawyer's fees from the Fund to 15%.⁴⁹ Although this criticism of the sliding-scale method of calculating fees was dicta, it still provided guidance to lawyers who practiced in the area of medical malpractice.

Based on the court's decisions in *Maley* and *Benjamin*, the result in *Stephens I* was not unexpected. Yet, *Stephens I* took ITLA by surprise. ITLA disagreed with the issue of whether the sliding-scale fee agreements were unreasonable fees under Rule 1.5(a) in medical malpractice cases.⁵⁰ After the *Stephens I* opinion was handed down in August 2006, ITLA "moved to intervene and [sought a] rehearing" of the court's decision in *Stephens I*.⁵¹ In its briefs, ITLA argued that, until *Stephens I*, the court had not made clear its view that the Medical Malpractice Act placed a 15% limit on a lawyer's fees from the Fund and that Rule 1.5(a) placed an ethical limit on a lawyer's fees for the portion of recovery from the medical provider.⁵² This ethical limit was based on the court's interpretation of the mandate under Rule 1.5(a) that a lawyer's fee must be reasonable.⁵³ In short, ITLA urged the court "to reconsider its conclusion [in *Stephens I*] that Respondent had improperly attempted to circumvent the limitation on attorney fees recoverable from the Fund."⁵⁴

In its argument, ITLA relied upon a 1980 decision in *Johnson v. St. Vincent Hospital, Inc.*⁵⁵ In *Johnson*, the court addressed the constitutionality of several aspects of the Medical Malpractice Act after it was enacted by the state legislature in 1975.⁵⁶ Among these challenges was a challenge to the limitation

46. *Id.* at 546 (citations omitted).

47. *Id.*; see also *In re Geller*, 777 N.E.2d 1099, 1099 (Ind. 2002) (continuing to follow the *Maley* reasoning as it pertains to fee structures in worker's compensation cases).

48. *In re Stephens (Stephens I)*, 851 N.E.2d 1256, 1257 (Ind. 2006).

49. *In re Benjamin*, 718 N.E.2d 1111, 1113 n.2 (Ind. 1999), overruled by *In re Stephens (Stephens II)*, 867 N.E.2d 148 (Ind. 2007).

50. *Stephens II*, 867 N.E.2d at 154.

51. *Id.* at 153.

52. *Id.* at 151-53.

53. *Id.* at 150.

54. *Id.*

55. *Id.* at 155.

56. *Johnson v. St. Vincent Hosp. Inc.*, 404 N.E.2d 585, 589 (Ind. 1980), overruled by *In re Stephens (Stephens II)*, 867 N.E.2d 148 (Ind. 2007).

on lawyer's fees from the Fund.⁵⁷ The constitutional issue in *Johnson* on a lawyer's fees was that "it interfere[d] with the individual's right to contract and to earn a living and [had] no rational basis in violation of due process and equal protection."⁵⁸ The *Johnson* court held, however, that the Medical Malpractice Act did not improperly infringe upon the right of the injured parties or lawyers to enter into contracts in medical malpractice cases.⁵⁹ The court reasoned:

In this case we examine the limitation imposed upon attorney fees for constitutional purposes alone. We find that there is a direct relationship between the limitation upon recovery and the limitation on attorney fees. The total amount recoverable by the injured patient was limited. The limitation on attorney fees follows naturally as a means of protecting the already diminished compensation due claimants from further erosion due to improvident or unreasonable contracts for legal services.

The specific limitation implanted by the Legislature does not seem to be one which will seriously impede the ability of the injured patient to employ effective counsel. It does not effect [sic] at all the enforceability of contracts made regarding fees to be paid from the first \$100,000 of recovery, as that amount is not received from the compensation fund. However, contracts providing for fees in excess of the limitation on awards from the compensation fund are not enforceable. The limitation will in practice result in legal fees ranging between about 20% to 35% of the total recovery. As a general proposition fees at this level are commonly considered reasonable in tort litigation.⁶⁰

ITLA used the "total recovery" language from *Johnson* and argued that sliding-scale fee arrangements in medical malpractice cases should be permissible as long as the attorney's fee from the total recovery is in the range of 20% to 35%.⁶¹ The *Stephens II* court characterized ITLA's argument as:

57. *Id.* at 602. The limitation on lawyer's fees in the Medical Malpractice Act is currently codified at Indiana Code section 34-18-18-1. It provides: "When a plaintiff is represented by an attorney in the prosecution of the plaintiff's claim, the plaintiff's attorney's fees from any award made from the patient's compensation fund may not exceed fifteen percent (15%) of any recovery from the fund." IND. CODE § 34-18-18-1 (2004). Additionally, Indiana Code section 34-18-18-2 provides: "A patient has the right to elect to pay for the attorney's services on a mutually satisfactory per diem basis. The election, however, must be exercised in written form at the time of employment." *Id.* § 34-18-18-2.

58. *Johnson*, 404 N.E.2d at 602.

59. *Id.* at 602-03.

60. *Id.*

61. *Stephens II*, 867 N.E.2d at 154.

ITLA states many past and current medical malpractice fee agreements, including the one initially employed by Respondent [(the lawyer in the *Stephens* cases)] in the current case, have been based on this sliding scale concept, often providing for a 35% overall fee, accomplished by a 15% fee from the Fund recovery plus an amount from the \$100,000 non-Fund recovery needed to make the total fee equal to 35% of the total recovery (“Sliding Scale Fee Arrangement”). ITLA argues, backed by affidavits of medical malpractice lawyers, that a Sliding Scale Fee Arrangement is reasonable in light of the expense, time, and risk attendant to representing medical malpractice plaintiffs. It seeks assurance that the Rules of Professional Conduct are not violated by a fee arrangement that produces a total fee of 20% to 35% of the total recovery.⁶²

The court answered ITLA’s argument by holding that “these rules [(Rules 1.5(a) and 1.5(c))], coupled with *Johnson*, mean an attorney may ethically charge a reasonable percentage of the client’s non-Fund recovery in order to recover a reasonable total fee.”⁶³ In short, the *Stephens II* court adopted a reasonable total fee theory and allowed the sliding-scale fee arrangement as proposed by ITLA. The court concluded, “[W]e cannot say the employment of the Sliding Scale Fee Arrangement to yield a contingent fee in the 32-35% range is unreasonable in all medical malpractice cases. To the extent *Johnson*, *Benjamin*, or *Stephens I* suggests otherwise, they are overruled.”⁶⁴ Thus, medical malpractice lawyers are permitted to use the sliding-scale method of calculating fees as long as the total fee is reasonable. The *Stephens II* court’s analysis allows lawyers in medical malpractice cases to take up to 100% of the health care provider’s portion of the recovery as long as the total fee is reasonable.⁶⁵ The *Stephens II* court explained that it was not able to clearly define a reasonable total fee:

62. *Id.*

63. *Id.* at 152. IND. PROF. COND. R. 1.5(c) provides:

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

64. *Stephens II*, 867 N.E.2d at 156.

65. *Id.* at 155.

Although a numerical answer to the question of reasonableness might have some utility, it is simply not possible to put a number on the ethical requirement that attorney fees be reasonable. Likewise, there can be no "safe harbor" range of permissible fees. Each case is unique and must be evaluated on its own terms, considering such factors as the complexity of the medical issues, the risk of a finding of no liability, the degree of dispute over damages, whether the case is fully tried, the anticipated litigation expenses, etc.⁶⁶

The *Stephens II* court, however, gave some general guidance for lawyers to determine whether their sliding-scale fees are reasonable in medical malpractice cases.

The court relied on five principles to explain what factors the legal practitioner should consider when determining whether a legal fee is reasonable.⁶⁷ First, the court inquired whether the limitation of the lawyer's fee from the Fund "seriously impede[s] the ability of the injured patient to employ effective counsel."⁶⁸ Second, the court pointed out that the limit on attorney fees in medical malpractice cases acts as an "effective cap on the total fee" for a lawyer, even if the attorney fees include 100% of the non-Fund portion of the recovery.⁶⁹ Third, the court pointed out that practitioners may look to the common custom for contingent fees in tort litigation to determine whether a fee is reasonable, and the court found that common custom in tort litigation included fees up to 35%, which are considered reasonable.⁷⁰ Fourth, the court emphasized that lawyers are required to put contingent fees in writing and that medical malpractice clients should be protected by lawyers providing a clear explanation of the sliding-scale method of calculating their fees in these written agreements.⁷¹ The fifth and final factor suggested by the court was the difficulty of each particular case.⁷² The court suggested that in some less difficult cases it might be more appropriate for lawyers to have fees from the lower end of "[t]he 20 to 35% range mentioned in *Johnson*."⁷³

One commentator noted that one of the arguments that helped to carry the day for ITLA's position was "that the Fund's fee cap, unless offset by higher-than-normal fees on provider recoveries, will push plaintiffs with difficult liability facts and smaller financial losses out of that compensation system

66. *Id.*

67. *Id.*

68. *Id.* (quoting *Johnson v. St. Vincent Hosp. Inc.*, 404 N.E.2d 585, 589 (Ind. 1980), overruled by *Stephens II*, 867 N.E.2d 148).

69. *Id.*

70. *Id.* at 156.

71. *Id.*; see IND. PROF. COND. R. 1.5(c) (requiring contingent fees to be written).

72. *Stephens II*, 867 N.E.2d at 156.

73. *Id.*; see *Johnson*, 404 N.E.2d at 603 (discussing the range of permissible fees of 20 to 35%).

altogether.”⁷⁴ This commentator concluded:

A question for the future is whether the plaintiffs’ med mal bar will back up its public policy argument by continuing to extend effective representation to plaintiffs who would have been marginalized out of the system under the *Stephens I* regime or, instead, cherry-pick cases using *Stephens II* as just an opportunity to enhance the bottom line.⁷⁵

The *Stephens II* case offers a few lessons for lawyers who do not practice in the area of medical malpractice. As one may readily surmise, the *Stephens II* case was not a typical disciplinary case. In a separate concurring opinion, Chief Justice Shepard criticized the per curiam’s process to determine whether the sliding-scale fee arrangement violated the Rules:

It is far from clear that today’s per curiam represents the best policy for determining reasonable fees at the intersection of Rule 1.5 and the medical malpractice statute. This process has morphed from an agreed-sanction disciplinary case into something that looks much like rule-making, except that it has lacked many of the steps thought useful for good rule-making. Partly for this reason, it does not answer a good many questions important to the topic.⁷⁶

Although Chief Justice Shepard is uncomfortable with the process in the *Stephens II* case, the Indiana Constitution gives the Indiana Supreme Court the full authority to regulate the practice of law in the State of Indiana.⁷⁷ The court could have decided *Stephens II* by the rule-making process as suggested by Chief Justice Shepard. However, *Stephens II* demonstrates how broad the supreme court’s power is in matters related to the practice of law.⁷⁸

The narrow holding of *Stephens II* is that lawyers may use a sliding-scale fee arrangement to calculate their fees in medical malpractice cases without running afoul of their ethical duties under the Rules. However, the court in *Stephens II* suggested a few principles that lawyers should keep in mind when determining the reasonableness of their fees. Specifically, the court suggested that any contingency fee in excess of 50% is not reasonable.⁷⁹ The court even went further and suggested that a contingency fee of 40% is ordinarily the maximum contingency fee in any tort litigation.⁸⁰

A final question is whether the court’s holding in *Stephens II* might cause the court to reconsider its holding in *Maley*. Both *Stephens II* and *Maley* were concerned with attorney’s fees that were regulated by other law. It appears that

74. Donald R. Lundberg, *Making the World Safe for Medical Malpractice Cases*, RES GESTAE, July/Aug. 2007, at 22, 24.

75. *Id.*

76. *Stephens II*, 867 N.E.2d at 157 (Shepard, C. J., concurring).

77. IND. CONST. art. VII, § 4.

78. *See Stephens II*, 867 N.E.2d 148.

79. *Id.* at 155.

80. *Id.* at 156.

the court is treating the regulated fees under the Medical Malpractice Act in *Stephens II* differently than the regulated fees under the Worker's Compensation Act in *Maley*.⁸¹ However, *Stephens II* is distinguishable from the *Maley* case. The Medical Malpractice Act has two sources of recovery: the health care provider and the Fund.⁸² By contrast, the Worker's Compensation Act only has one source of recovery.⁸³ Because the lawyer's fees are derived from one source, the regulated fees in the worker's compensation cases are not open to the total fee theory under *Stephens II*.

II. JUDGES AND ALCOHOL-RELATED CRIMES

In 2007, the Indiana Supreme Court handled a rare case of judicial misconduct in *In re Hanley*.⁸⁴ The judge in *Hanley* pled guilty to "operating a motor vehicle with an alcohol concentration equivalent of at least .15 gram of alcohol per either 100 milliliters of the person's blood or 210 liters of the person's breath," which was a class A misdemeanor in violation of Indiana Code section 9-30-5-1(b).⁸⁵ The court and the Indiana Judicial Qualifications Commission agreed that the judge's conduct violated Indiana Judicial Conduct Canons 1(A)⁸⁶ and 2(A).⁸⁷ The judge and the Commission also agreed that the appropriate sanction for this type of judicial misconduct was a public reprimand.⁸⁸ The court found this sanction appropriate and reprimanded the judge for his criminal conduct.⁸⁹

While lawyers often are not disciplined for one instance of an alcohol-related offense,⁹⁰ prosecutors and judges are held to a higher standard.⁹¹ Prosecutors and

81. *Id.* at 148.

82. *See generally* IND. CODE § 34-18-15-3 (2004).

83. *See id.* § 22-3-2-2.

84. 867 N.E.2d 157 (Ind. 2007).

85. *Id.* at 158. IND. CODE § 9-30-5-1(b) (2004) provides: "(b) A person who operates a vehicle with an alcohol concentration equivalent to at least fifteen-hundredths (0.15) gram of alcohol per: (1) one hundred (100) milliliters of the person's blood; or (2) two hundred ten (210) liters of the person's breath; commits a Class A misdemeanor."

86. IND. CODE OF JUD. COND. Canon 1(A) provides:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards in order to preserve the integrity and independence of the judiciary. The provisions of this Code are to be construed and applied to further that objective.

87. IND. CODE OF JUD. COND. Canon 2(A) provides: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

88. *In re Hanley*, 867 N.E.2d at 158.

89. *Id.* at 157-58.

90. *See In re Seat*, 588 N.E.2d 1262, 1264 (Ind. 1992) (holding that a lawyer has not violated rule prohibiting lawyers from committing criminal acts when the lawyer was arrested on an isolated

judges are held to a higher standard than lawyers who do not enforce the law because prosecutors and judges have special responsibilities to the judicial system and duties to enforce the law.

III. SANCTIONS FOR CRIMINAL CONDUCT OF ATTORNEYS

At first glance, the sanctions for cases involving lawyers who commit criminal acts⁹² from 2007 appear to vary from case to case. One explanation for this range in sanctions could be caused by the fact that certain crimes are more serious than others. However, another explanation for this range in sanctions is that the Indiana Supreme Court has found that seeking professional help before being sanctioned is a mitigator for the professional misconduct of the lawyer. This mitigation is particularly helpful for lawyers who commit alcohol-related crimes or commit crimes while under the influence of alcohol. However, even alcohol-related crimes merit stiff sanctions from the court when the lawyer has a history of such offenses.

In a serious alcohol-related crime, the court found that the period of suspension from the practice of law for a lawyer sentenced to prison should not be less than the period the lawyer was incarcerated in *In re Beerbower*.⁹³ The respondent had an extensive history of alcohol-related convictions and “pled guilty to Operating a Vehicle While Intoxicated Causing Serious Bodily Injury, a Class C Felony.”⁹⁴ On April 23, 2007, the lawyer was sentenced to four years in prison for his crime.⁹⁵ The Disciplinary Commission and the lawyer in *Beerbower* came to an agreement, which was accepted by the court, that the

driving while intoxicated charge and has never been alcohol dependent nor has a history of alcohol related offenses); *In re Oliver*, 493 N.E.2d 1237, 1241 (Ind. 1986) (same). Cf. *In re Haith*, 742 N.E.2d 940, 941-42 (Ind. 2001) (holding that a lawyer violated rule prohibiting lawyers from committing criminal acts that reflect adversely on the lawyer’s fitness when the lawyer had three convictions for operating a vehicle while intoxicated).

91. *In re Hanley*, 867 N.E.2d at 157. See *In re Oliver*, 493 N.E.2d at 1242 (holding that a special prosecutor engaged in conduct prejudicial to the administration of justice by operating a vehicle while intoxicated and reasoning that prosecutors and judges have additional ethical responsibilities to not harm the public esteem of the judicial system by violating the criminal law); see also *In re Brinley*, 785 N.E.2d 1099, 1100 (Ind. 2003) (holding deputy prosecutor’s guilty plea to public intoxication was prejudicial to the administration of justice); *In re McFadden*, 729 N.E.2d 137, 138 (Ind. 2000) (holding that deputy prosecutor’s conviction for public intoxication was prejudicial to the administration of justice); *In re Sims*, 665 N.E.2d 584, 585 (Ind. 1996) (deputy prosecutor’s operating a vehicle while intoxicated was prejudicial to the administration of justice); *In re Schenk*, 612 N.E.2d 1059, 1059 (Ind. 1993) (same); *In re Seat*, 588 N.E.2d at 1264 (same).

92. IND. PROF. COND. R. 8.4(b) provides: “It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. . . .”

93. *In re Beerbower*, 873 N.E.2d 52, 52 (Ind. 2007).

94. *Id.*

95. *Id.*

lawyer should be suspended from the practice of law without automatic reinstatement for two years or as long as the lawyer was incarcerated, whichever was longer.⁹⁶ The *Beerbower* case suggests that the court considers a lawyer's prison sentence as inconsistent with having an active license to practice law.

In a case decided on the same day as *Beerbower*, *In re McClellan*,⁹⁷ the court approved a much lighter sanction for a lawyer charged with possession of cocaine as a class D felony. The lawyer in *McClellan* was charged with possession of cocaine, a class D felony, and public intoxication, a class B misdemeanor, on July 18, 2006.⁹⁸ The criminal case was still pending when the Disciplinary Commission and the lawyer in *McClellan* reached an agreement.⁹⁹ The court accepted this agreement and gave the lawyer a suspension from the practice of law for 180 days, with the first thirty days served as an active suspension and the remainder of the suspension conditionally stayed while the lawyer in *McClellan* was subject to a probationary period of two years.¹⁰⁰ The court emphasized, in accepting this agreement, that the lawyer had successfully undergone extensive treatment for his addiction and was engaged in a monitoring agreement with the Judges and Lawyers Assistance Program ("JLAP").¹⁰¹

In *In re Thompson*,¹⁰² the court also found that another lawyer's possession of cocaine should be treated in a similar manner as *McClellan*. In *In re Thompson*, the lawyer pled guilty to possession of cocaine in violation of Indiana Code section 35-48-4-6(a) as a class D felony.¹⁰³ The trial court sentenced the lawyer in *Thompson* as a class A misdemeanor, and he received a criminal sentence of one year in jail with eight days served and the rest on probation.¹⁰⁴ Noting the lawyer's long period of abstinence from illegal substances, intensive treatment, and participation in JLAP, the Indiana Supreme Court suspended the lawyer in *Thompson* for a period of six months with an active suspension of thirty days.¹⁰⁵ Like *McClellan*, the balance of the suspension was conditionally stayed while the lawyer completed one-year probation with JLAP monitoring.¹⁰⁶

Intensive treatment before the disciplinary case is resolved, along with

96. *Id.*

97. *In re McClellan*, 873 N.E.2d 57, 57 (Ind. 2007).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. 866 N.E.2d 723 (Ind. 2007).

103. *Id.* at 724. IND. CODE § 35-48-4-6(a) (2004) provides:

A person who, without a valid prescription or order of a practitioner acting in the course of the practitioner's professional practice, knowingly or intentionally possesses cocaine (pure or adulterated) or a narcotic drug (pure or adulterated) classified in schedule I or II, commits possession of cocaine or a narcotic drug, a Class D felony, except as provided in subsection (b).

104. *In re Thompson*, 866 N.E.2d at 724.

105. *Id.*

106. *Id.*

continued participation in JLAP, have been effective mitigators in criminal cases involving alcohol abuse and/or drug use.¹⁰⁷ This trend to use treatment and JLAP participation as a mitigator is beginning to find its way into cases where the misconduct is not a criminal conviction for alcohol-related or drug offenses. In *In re Renz*,¹⁰⁸ the court found that the lawyer's treatment and participation in JLAP were mitigators that influenced the court to impose a stayed suspension in a case where an "executed suspension time would be appropriate."¹⁰⁹ The lawyer in *Renz* engaged in a sexual act with a client he represented in a divorce.¹¹⁰ The court's order in *Renz* does not spell out the type of treatment the lawyer received, nor does the court outline the terms of the lawyer's participation in JLAP.

Finally, the court found in *In re Raquet*,¹¹¹ in which the lawyer was charged with possession of child pornography as a class A misdemeanor, sufficient mitigation based on the lawyer seeking professional help that he received a suspension of thirty days with automatic reinstatement.¹¹² In 2001, the lawyer viewed child pornography for a period of about three months. As the court put it: "Respondent viewed child pornography on the internet, printed some of the photographs, and paid some unknown on-line provider for the material. There is no evidence that he downloaded any photos."¹¹³ In December 2002, the respondent began to receive counseling and continued through the time of his disciplinary hearing. In March 2004, the attorney was "charged in state court with possession of child pornography, a Class A Misdemeanor."¹¹⁴ The respondent entered into a "pretrial diversion agreement" with the prosecutor's office, and the charges were dismissed after he completed the terms of the diversion program in June 2005.¹¹⁵ In March 2006, the Disciplinary Commission filed a verified complaint against the respondent based on his criminal conduct. The Commission tried the case before a hearing officer, and the hearing officer

107. See *In re Gosnell*, 864 N.E.2d 1020, 1021 (Ind. 2007) (finding treatment and continued JLAP participation as mitigation for lawyer convicted of operating while intoxicated); *In re Spencer*, 863 N.E.2d 299, 299 (Ind. 2007) (finding continued JLAP participation as mitigation for lawyer convicted of operating a vehicle while intoxicated).

108. 856 N.E.2d 706 (Ind. 2006).

109. *Id.*

110. The court found that the lawyer in *Renz*

violated . . . Rule 1.7(b)(2) . . . , which prohibits a lawyer from representing a client where the representation may be materially limited by the lawyer's own interests unless the client consents after consultation; and, [Rule] 1.8(j) . . . , which prohibits a lawyer from engaging in a sexual relationship with a client unless a consensual sexual relationship existed when the client-lawyer relationship commenced.

Id.

111. 870 N.E.2d 1048 (Ind. 2007).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

recommended that the respondent be given a private reprimand.¹¹⁶ The court found that the respondent violated Rule 8.4(b) by engaging in criminal conduct.¹¹⁷

The court held that the respondent's conduct, which "furthers the sexual exploitation of children" called "for sterner discipline than a reprimand."¹¹⁸ The court cited to the case *In re Conn*¹¹⁹ as support for its holding that the respondent in *Raquet* should be given sterner discipline.¹²⁰ The lawyer in *Conn* received a "two-year suspension for receiving and transmitting child pornography over the internet and for failing to disclose . . . [the] federal investigation of his criminal conduct" on his bar application.¹²¹ In holding that the respondent in *Raquet* be suspended from the practice of law for thirty days, the court found significant mitigating factors:

Respondent's encounter with child pornography was brief and it occurred six years ago. Respondent has taken responsibility for his actions by seeking professional help, cooperating with all investigations of his actions, and admitting his misconduct. He is remorseful and this misconduct is the only blot on his legal career since he was admitted to practice in 1983.¹²²

It is clear from the above cases that the court is persuaded by a lawyer's participation in JLAP or a lawyer's seeking of professional help as a source of significant mitigation. The court is influenced by this sort of mitigation to the extent that a lawyer might be able to avoid a long-term suspension without automatic reinstatement if the lawyer participates in JLAP or seeks other professional help before the lawyer is sanctioned by the court.

IV. IMPROPER TRIAL STRATEGIES

During this reporting period, the court has looked at various cases in which lawyers used improper trial strategies in their representation of clients. Generally, these duties have to do with not being candid to the tribunal,¹²³ using improper influence with the courts,¹²⁴ improperly using the court procedures to harass another,¹²⁵ and improperly delaying the opposing party's good faith case against the lawyer's client.¹²⁶

116. *Id.*

117. *Id.*

118. *Id.*

119. *In re Conn*, 715 N.E.2d 379 (Ind. 1999).

120. *In re Raquet*, 870 N.E.2d at 1048.

121. *Id.* (citing *In re Conn*, 715 N.E.2d at 382).

122. *Id.*

123. See IND. PROF. COND. R. 3.3.

124. See IND. PROF. COND. R. 3.5.

125. See IND. PROF. COND. R. 3.1.

126. See IND. PROF. COND. R. 3.2.

One case during 2007 is *In re Coleman*.¹²⁷ At first blush, *Coleman* looks like a typical neglect case, except the lawyer's neglect in this case interfered with the judicial process and with the opposing party's good faith litigation of a case against his client.¹²⁸ In *Coleman*, the lawyer represented a client in an employment discrimination claim and a worker's compensation claim.¹²⁹ The lawyer filed the employment discrimination claim in federal court in December 2001 and filed a claim for his client with the Worker's Compensation Board in November 2001.¹³⁰ However, the lawyer did little to advance either of the client's claims.¹³¹

In the employment discrimination case, the trial court ordered the lawyer in *Coleman* to file preliminary witness and exhibit lists, a statement of special damages, a settlement demand, and a confidential settlement statement.¹³² The lawyer failed to do so.¹³³ Also, the lawyer failed to respond to discovery requests of the opposing party, although the client had signed interrogatories and given these interrogatories to the lawyer.¹³⁴ As a result of the lawyer's failure to respond to the discovery requests, the opposing party moved the trial court to order compliance.¹³⁵ The trial court issued an order for the lawyer in *Coleman* to comply with the opposing party's discovery requests.¹³⁶ The lawyer in *Coleman* eventually responded to the discovery requests, but the responses were inadequate.¹³⁷

In May 2003, opposing counsel filed a motion for summary judgment. The lawyer failed to respond to it on behalf of his client.¹³⁸ The trial court granted the motion for summary judgment and dismissed the case.¹³⁹ The opposing counsel filed a petition for costs, which the court granted.¹⁴⁰ The lawyer failed to inform his client that the employment discrimination case had been dismissed and costs had been assessed against the client.¹⁴¹ After the client learned from the clerk of the court that the employment discrimination case had been dismissed, the client asked the lawyer for her file.¹⁴² The lawyer gave his client part of her file.¹⁴³

127. 867 N.E.2d 132 (Ind. 2007).

128. *Id.* at 133-34.

129. *Id.* at 132.

130. *Id.* at 133.

131. *Id.* at 132-33.

132. *Id.* at 132.

133. *Id.*

134. *Id.*

135. *Id.* at 132-33.

136. *Id.* at 133.

137. *Id.* at 133-34.

138. *Id.* at 133.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

In the worker's compensation case, the opposing party requested three times that the lawyer provide information to substantiate the claim of the lawyer's client and a settlement demand.¹⁴⁴ The lawyer failed to respond to the opposing party's requests in a timely manner, so the opposing party filed a motion to dismiss the worker's compensation claim for lack of prosecution or, in the alternative, to compel discovery.¹⁴⁵ The Worker's Compensation Board gave the lawyer a deadline to comply with discovery.¹⁴⁶ The lawyer eventually supplied the opposing party with some discovery responses, but did not supply a settlement demand.¹⁴⁷ On December 22, 2003, the lawyer received a settlement offer for his client in the worker's compensation case.¹⁴⁸ The lawyer failed to inform his client that he received this settlement offer. This settlement offer was communicated to the lawyer about two months after the client retrieved her file from her lawyer.¹⁴⁹ In June 2004, the client settled her worker's compensation claim on her own.¹⁵⁰

In addition to the typical neglect-type charges,¹⁵¹ the court found that the lawyer's neglect in *Coleman* caused him to violate his duties to the trial court and to the opposing party.¹⁵² The court held that the lawyer in *Coleman* violated his duty to the trial court by knowingly disobeying his obligations under the rules of a tribunal.¹⁵³ The court also held that the neglect of the lawyer in *Coleman* caused the lawyer to violate his duties to the opposing party by failing to make

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. The Indiana Supreme Court found that the lawyer's neglect of his duties to his client amounted to violations of the following Rules:

1.2(a): failure to abide by his client's decisions concerning the objectives of the representation;

1.3: failure to act with reasonable diligence and promptness;

1.4(a): failure to keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information;

1.4(b): failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions; [and]

1.16(d): failure to surrender papers and property to which the client was entitled, and failure to take reasonable steps to protect client's interest upon termination or representation.

Id. at 134.

152. *Id.*

153. *Id.* IND. PROF. COND. R. 3.4(c) provides: "A lawyer shall not: . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. . . ."

reasonable efforts to comply with legally proper discovery requests.¹⁵⁴

Another more pernicious form of interference with the judicial process occurred in *In re Lehman*.¹⁵⁵ While the lawyer was representing his client in a personal injury claim, the lawyer in *Lehman* learned that the opposing party's lawyer had served as a judge *pro tem* in the trial court where his client's case was pending.¹⁵⁶ The opposing counsel had served as a judge *pro tem* on two occasions after the client's litigation began, but the opposing counsel did not take any action on the personal injury case while acting as judge *pro tem*.¹⁵⁷ The lawyer in *Lehman* attempted to have any judge from the trial court disqualified from hearing the personal injury case and have the case transferred to another court.¹⁵⁸ However, the motion to disqualify was denied.¹⁵⁹ Then the lawyer in *Lehman* filed a motion to continue the trial date.¹⁶⁰ After he filed the motion to continue, the lawyer in *Lehman* told the lawyer for the opposing party that his client wanted to file a complaint against the opposing counsel with the Indiana Judicial Qualifications Commission.¹⁶¹ The respondent also told the opposing counsel that he would attempt to dissuade his client from filing a complaint with the Indiana Judicial Qualifications Commission in exchange for the opposing counsel's agreement to continue the trial date.¹⁶² However, the opposing counsel refused to consent to the continuance, and the trial court denied the motion to continue the trial date.¹⁶³ Eventually, the personal injury case settled without a trial.¹⁶⁴ The court held that the lawyer in *Lehman* violated Rule 8.4(d)¹⁶⁵ by "communicating to opposing counsel a willingness to attempt to dissuade his clients from filing a complaint against opposing counsel as a *quid pro quo* for opposing counsel's agreement to a continuance."¹⁶⁶ The lesson in *Lehman* is that

154. *In re Coleman*, 867 N.E.2d at 134. IND. PROF. COND. R. 3.4(d) provides: "A lawyer shall not: . . . in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party. . . ."

155. 861 N.E.2d 708 (Ind. 2007).

156. *Id.* at 709.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. IND. PROF. COND. R. 8.4(d) provides: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice. . . ."

166. *In re Lehman*, 861 N.E.2d at 708. *Cf. In re Freeman*, 835 N.E.2d 494, 498 (Ind. 2005) (holding that a lawyer's threat to "make trouble" for an incarcerated former client while he was "locked up" if the former client sent another letter to the lawyer violated Rule 8.4(d)); *In re Whitney*, 820 N.E.2d 143, 143 (Ind. 2005) (holding that a lawyer's threat to file a defamation suit against a client if she filed a grievance with the Disciplinary Commission against the lawyer violated Rule 8.4(d)); *In re Cartmel*, 676 N.E.2d 1047, 1050 (Ind. 1997) (holding that a lawyer's

a lawyer should not leverage his client's desire to file a grievance against the opposing counsel to attempt to gain an advantage in the litigation of his client's case.

In *In re James*,¹⁶⁷ the lawyer used deception in his attempt to persuade the trial court to rule favorably for his client. The lawyer in *James* represented a client charged with operating while intoxicated ("OWI") as a class D felony.¹⁶⁸ The client was charged with a class D felony rather than a misdemeanor because the client had prior convictions in Kentucky for similar crimes.¹⁶⁹ The client pled guilty to the OWI charge.¹⁷⁰ The lawyer falsely told the judge at the sentencing hearing that five of his client's convictions in Kentucky had been expunged or vacated.¹⁷¹ The lawyer told the judge this false information as an attempt to avoid a statutory limitation on the judge's ability to suspend his client's sentence.¹⁷² The judge asked the lawyer in *James* to produce documents to support his false assertion, and the lawyer was unable to do so.¹⁷³ The Indiana Supreme Court held that the lawyer in *James* made a false statement of fact to the

agreement with client calling for dismissal of grievance filed with the Disciplinary Commission against the lawyer violated Rule 8.4(d)); *In re Blackwelder*, 615 N.E.2d 106, 108 (Ind. 1993) (holding that a procuring a promise from a client not to file a grievance with the Disciplinary Commission violated Rule 8.4(d)).

167. 861 N.E.2d 703 (Ind. 2007).

168. *Id.* IND. CODE § 9-30-5-1 (2004) provides, in part:

(a) A person who operates a vehicle with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol but less than fifteen-hundredths (0.15) gram of alcohol per:

- (1) one hundred (100) milliliters of the person's blood; or
- (2) two hundred ten (210) liters of the person's breath;

commits a Class C misdemeanor.

(b) A person who operates a vehicle with an alcohol concentration equivalent to at least fifteen hundredths (0.15) gram of alcohol per:

- (1) one hundred (100) milliliters of the person's blood; or
- (2) two hundred ten (210) liters of the person's breath;

commits a Class A misdemeanor.

IND. CODE § 9-30-5-3 (2004) provides, in part:

A person who violates section 1 or 2 of this chapter commits a Class D felony if:

- (1) the person has a previous conviction of operating while intoxicated that occurred within the five (5) years immediately preceding the occurrence of the violation of section 1 or 2 of this chapter

169. *In re James*, 861 N.E.2d at 703.

170. *Id.*

171. *Id.*

172. *Id.*; see IND. CODE § 35-50-2-2(b) (2004) (providing that a trial court may suspend any part of a sentence for a felony unless the crime committed was a class D felony and less than three years have elapsed between the date the person was discharged from probation, imprisonment, or parole).

173. *In re James*, 861 N.E.2d at 703.

trial court in violation of Rule 3.3(a)(1).¹⁷⁴

In this reporting period, the court addressed, again, the lawyer's duty to not engage in ex parte communication with judges in *In re Robison*.¹⁷⁵ The lawyer in *Robison* represented the husband in a divorce. The couple separated in February 2005, and the wife remained in the house.¹⁷⁶ On February 14, 2005, the husband's lawyer filed the petition for dissolution of marriage and a motion for a restraining order.¹⁷⁷ In this motion, the lawyer alleged that the house belonged to the husband and sought to have the wife removed from the property. The wife was not represented.¹⁷⁸ The motion for a restraining order was not verified, and the husband's lawyer did not certify to the court the efforts he had made to notify the wife of this motion or why notice should not be given.¹⁷⁹ However, the judge signed the restraining order, and the sheriff removed the wife from the home.¹⁸⁰ The court held that the lawyer in *Robison* violated Rule 3.5(b)¹⁸¹ by engaging in ex parte communication with the judge and sanctioned the lawyer with a public reprimand.¹⁸²

V. JUSTICE DELAYED

Finally in 2007, the court found that a judge's neglect of his duties brought "discredit on him and the Indiana judicial system" in *In re Newman*.¹⁸³ In October 2000, the trial court judge presided over a probation violation matter and

174. *Id.* IND. PROF. COND. R. 3.3(a)(1) provides: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. . . ."

175. 856 N.E.2d 1202 (Ind. 2006); *see In re Ettl*, 851 N.E.2d 1258, 1260 (Ind. 2006) (holding ex parte communication with judge violates Rule 3.5(b)); *In re Anonymous*, 786 N.E.2d 1185, 1189 (Ind. 2003) (same); *In re Wilder*, 764 N.E.2d 617, 621 (Ind. 2002) (same).

176. *In re Robison*, 856 N.E.2d at 1203.

177. *Id.*

178. *Id.*

179. *Id.* IND. TRIAL R. 65(b) provides, in part:

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

180. *In re Robison*, 856 N.E.2d at 1203.

181. IND. PROF. COND. R. 3.5(b) provides: "A lawyer shall not: . . . communicate ex parte with such a person [(judge, juror, prospective juror or other official)] during the proceeding unless authorized to do so by law or court order. . . ."

182. *In re Robison*, 856 N.E.2d at 1203.

183. 858 N.E.2d 632, 635 (Ind. 2006).

found the defendant had violated his probation.¹⁸⁴ The judge sentenced the defendant to serve the duration of his original six-year term in the Department of Correction ("DOC").¹⁸⁵ The defendant appealed the trial judge's decision.¹⁸⁶

On July 18, 2001, the Indiana Court of Appeals issued an opinion concluding that the judge erred in revoking the defendant's probation and in sentencing the defendant to the DOC.¹⁸⁷ The court of appeals remanded the case to the trial court for proceedings consistent with its opinion.¹⁸⁸ Judge Carr Darden, an appellate court judge, wrote a concurring opinion that agreed with the majority's opinion, but Judge Darden said he "would order immediate release and discharge in this matter."¹⁸⁹ The court of appeals sent a copy of the opinion to the judge by facsimile on the same day it issued its opinion.¹⁹⁰ When he received it, the judge instructed his court reporter to arrange for the defendant's release from the DOC.¹⁹¹ However, the judge did not instruct his court reporter to prepare an order for the release of the defendant.¹⁹²

Then, the court reporter prepared an entry for the court's chronological case summary ("CCS"):

Opinion—for publication handed down by the Indiana Court of Appeals concluding that trial court improperly revoked defendant's probation and remands for further proceedings Further, Judge Darden . . . [finds] that there is no evidence that supports further delay by the State for keeping the defendant locked up and would order immediate release and discharge in this matter. Judge Newman agrees and orders defendant released from DOC.¹⁹³

This CCS entry was not sent to the DOC.¹⁹⁴ However, it was sent to the State, the defendant's appellate lawyer, and to the probation authorities.¹⁹⁵ In short, the defendant was not released from the DOC until he had served the full term of his original sentence with adjustments for credit time.¹⁹⁶ The defendant was released from the custody of the DOC on September 6, 2002.¹⁹⁷

The Indiana Supreme Court found that the judge in *Newman* violated Canon

184. *Id.* at 633-34.

185. *Id.* at 634.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

1A,¹⁹⁸ Canon 2A,¹⁹⁹ Canon 3B(9),²⁰⁰ and Canon 3C(2)²⁰¹ of the Indiana Code of Judicial Conduct.²⁰² The Indiana Supreme Court concluded that the judge in *Newman* should receive a public reprimand for his neglect of this case.²⁰³ The court reasoned:

It goes without saying that a trial court judge is duty-bound to carry out the orders of a reviewing appellate tribunal. That duty is at its highest when an appellate remand order affects the substantial rights and interests of a party under the trial court's control. When a trial court judge fails in this duty, the appellate relief secured by the party evaporates. Dawson [the defendant] can never regain the time and freedom that the [c]ourt of [a]ppeals' [s] opinion granted him.²⁰⁴

The judge's failure to order the defendant's release from the DOC as the court of appeals instructed in its opinion caused the defendant to lose his liberty rights.²⁰⁵ Thus, the judge's neglect of his duties had significant consequences for an individual under his control as the trial court judge.²⁰⁶

198. IND. CODE OF JUD. COND. Canon 1A provides:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards in order to preserve the integrity and independence of the judiciary. The provisions of this Code are to be construed and applied to further that objective.

199. IND. CODE OF JUD. COND. Canon 2A provides: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

200. IND. CODE OF JUD. COND. Canon 3B(9) provides: "A judge shall dispose of all judicial matters fairly, promptly, and efficiently."

201. IND. CODE OF JUD. COND. Canon 3C(2) provides: "A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties."

202. *In re Newman*, 858 N.E.2d at 635.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY LAW

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This Article takes a topical approach to the notable real property cases in the courts of the State of Indiana in this survey period, October 1, 2006, through September 20, 2007, and analyzes noteworthy cases in each of the following areas: servitudes; landlord/tenant law; developments in the common law; real estate contracts; tax sales; liens and mortgages. In addition, this Article summarizes new statutes that became effective July 1, 2007.

I. SERVITUDES

A. Restrictive Covenants—Non-Waiver Clause

*Johnson v. Dawson*¹ is the latest chapter in the Indiana appellate courts' confusing enforcement of restrictive covenants. It presents a question of first impression in Indiana: is a nonwaiver clause in a multi-party restrictive covenant enforceable?² The Johnsons owned a home in Meadowbrook Subdivision in Tippecanoe County.³ The subdivision was subjected to a declaration of covenants, restrictions, and conditions when it was developed in 1956.⁴ The Johnsons purchased their home subject to the restrictions.⁵ The Johnsons sought to construct an additional detached private garage on their lot, which was in clear violation of one of the restrictive covenants.⁶ The homeowners board initially approved the Johnsons' request to construct the garage, then subsequently voted to disapprove of the construction.⁷ Dawson, Nelson, Graham, and Kauffman (collectively, "Plaintiffs") filed suit in trial court to enjoin the Johnsons from constructing the garage.⁸ The trial court found in favor of the Plaintiffs and issued the injunction, as well as attorneys fees, to the Plaintiffs, and the Johnsons appealed.⁹

The court of appeals agreed with the trial court that some of the language of the restrictive covenant was unambiguous and operated to preclude the Johnsons from building their second garage.¹⁰ The court then turned to the Johnsons' second argument that Dawson "acquiesced in prior restrictive covenant violations

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1. 856 N.E.2d 769 (Ind. Ct. App. 2006).

2. *Id.* at 774.

3. *Id.* at 771.

4. *Id.*

5. *Id.*

6. *Id.* at 771-72.

7. *Id.*

8. *See id.*

9. *Id.* at 769.

10. *Id.* at 774.

of other Meadowbrook landowners and is therefore barred from challenging the Johnsons' building of the additional detached two-car garage."¹¹ The Meadowbrook covenants contained the following "nonwaiver" clause: "The failure for any period of time to compel compliance with any restrictions, condition or covenant shall in no event be deemed as a waiver of the right to do so thereafter, and shall in no way be construed as a permission to deviate from said restrictions, conditions and covenants."¹² The court noted that while nonwaiver clauses are generally enforced in Indiana, the Johnsons argued that such clauses "have not been enforced [in Indiana law] in the context of a multi-party restrictive covenant. This difference is material."¹³ The court agreed that this issue was a question of first impression in Indiana.¹⁴ The Johnsons asserted, apparently on public policy grounds, that a multi-party nonwaiver clause is per se unenforceable because otherwise it "is less likely to have a beneficial effect, and far more likely to have an insidious one" due to the possibility of selective enforcement.¹⁵ The court was unmoved by this argument, noting that the Johnsons agreed to the restrictive covenant and nonwaiver clause by purchasing the home and that "even if violations and selective enforcement are occurring, the Johnsons are bound by the clause."¹⁶

Johnson v. Dawson, with its strict application of the restrictive covenant and apparent lack of concern for public policy arguments, seems out of step with recent appellate jurisprudence in Indiana on the subject of restrictive covenants. For example, although the trial court granted the Plaintiffs' request for equitable relief, there was no discussion by the Indiana Court of Appeals on whether the trial court found that the Plaintiffs had no adequate remedy at law.¹⁷ The court's failure to ask this question is inconsistent with the 2003 *Kesler v. Marshall*¹⁸ decision, in which the court of appeals acknowledged that the trial court has the discretion to award equitable remedies but cautioned that "such judicial discretion is not arbitrary, but is governed by and must conform to the well-settled rules of equity."¹⁹ Those "well-settled rules" include the notions that equitable remedies are "extraordinary" remedies and that they are "not available as a matter of right."²⁰ Instead, equitable remedies are only available when no adequate remedy at law, i.e. monetary damages, exists: "Where substantial justice can be accomplished by following the law, and the parties' actions are clearly governed by rules of law, equity follows the law."²¹ Judge Robb's dissent

11. *Id.*

12. *Id.*

13. *Id.* (quoting Appellants' Brief at 7, *Johnson*, 856 N.E.2d 769 (No. 79A04-0601-CV-8)).

14. *Id.* (quoting Appellants' Brief, *supra* note 13, at 8).

15. *Id.* at 775.

16. *Id.*

17. *See Johnson v. Dawson*, 856 N.E.2d 769 (Ind. Ct. App. 2006).

18. 792 N.E.2d 893 (Ind. Ct. App. 2003).

19. *Id.* at 896 (citing *Wagner v. Estate of Fox*, 717 N.E.2d 195, 200 (Ind. Ct. App. 1999)).

20. *Id.*

21. *Id.* at 897 (citing *Porter v. Bankers Trust Co.*, 773 N.E.2d 901 (Ind. Ct. App. 2002)).

in *Johnson* is more consistent with recent jurisprudence as it reflects more concern for the Johnsons' free use of their property and the idea that restrictive covenants should be construed against their drafters.²² Unfortunately for practitioners who rely heavily on restrictive covenants in commercial and residential developments, the court of appeals continues to send mixed messages regarding its application and interpretation of these agreements.

B. Breach of Access Easement

*Drees Co. v. Thompson*²³ addressed the appropriate remedy for the breach of a servitude. Thompson owned one-acre parcel surrounded by twenty-nine acres owned by Drees.²⁴ An express easement granted by Drees's predecessor in title gave Thompson "a non-exclusive easement for ingress and egress" to the Thompson parcel over a particular strip of real estate located on the Drees parcel.²⁵ Drees proposed to develop its parcel into a subdivision with fifty homes and submitted its plan to the appropriate governmental body.²⁶ The plan included the preservation of the ingress/egress easement, with the subdivision residents being permitted to use the path for biking and walking.²⁷ Thompson filed a complaint for declaratory judgment and injunctive relief and sought a preliminary injunction.²⁸ The trial court granted both the preliminary injunction and, ultimately, a permanent injunction to prevent Drees from completing its development plan, so Drees appealed.²⁹

Drees argued on appeal that the trial court erred in granting the permanent injunction because: (a) the easement was non-exclusive; (b) the Thompsons relied on concerns of vandalism, inconvenience, and possible cancellation of homeowner's insurance, all of which are unrelated to their easement rights; and (c) the necessity of the original easement would no longer exist once the Drees parcel was developed.³⁰

The main portion of the court's decision dealt with whether the injunction was appropriate.³¹ The court noted that "permanent injunctions are limited to prohibiting injurious interference with rights" and that grant or denial of them is reviewed on an abuse of discretion standard.³² According to the court, four factors must be considered:

22. See *Johnson*, 856 N.E.2d at 776-78 (Robb, J., dissenting).

23. 868 N.E.2d 32 (Ind. Ct. App. 2007), *trans. denied*, 878 N.E.2d 220 (Ind. 2007).

24. *Id.* at 35.

25. *Id.* at 37, 39.

26. *Id.* at 36.

27. *Id.* at 37-38.

28. *Id.* at 37.

29. *Id.* at 37-38.

30. *Id.* at 38.

31. See *id.* at 38-45.

32. *Id.* at 41 (citing *Ferrell v. Dunescape Beach Club Condos. Phase I, Inc.*, 751 N.E.2d 702, 712 (Ind. Ct. App. 2001)).

(1) whether the plaintiff has succeeded on the merits; (2) whether plaintiff's remedies at law are adequate; (3) whether the threatened injury to the plaintiff outweighs the threatened harm a grant of relief would occasion upon the defendant; and (4) whether the public interest would be disserved by granting relief.³³

As to the first prong of the analysis, whether the plaintiff would succeed on the merits, the court of appeals reviewed each of the Thompsons' arguments to determine whether the proposed development would be contrary to its easement rights.³⁴ The court was not convinced that any of the Thompsons' arguments had merit and concluded that the trial court abused its discretion in granting the injunction because the Thompsons could not prevail on their underlying argument.³⁵ In so deciding, the court of appeals did not need to address the other factors, and the case was reversed and remanded with instructions.³⁶

II. LANDLORD/TENANT LAW

A. Subtenant Hold-over

*Fields v. Conforti*³⁷ presented an issue of first impression in Indiana with respect to a tenant's liability in the event that a subtenant holds over after a lease expires.³⁸ Conforti owned a home and agreed to lease it to Marlow, with an option to purchase.³⁹ The lease contained a hold-over clause which read: "Any holding over after the expiration of the term of this lease, with the consent of the Lessor, shall be construed as a month-to-month tenancy in accordance with the terms hereof, as applicable."⁴⁰ "Marlow and Conforti also signed a 'Permission to Sublet' form, in which Conforti granted Marlow the right to sublet the residence to the Fieldses."⁴¹ The document expressly did not release Marlow from liability during the sublease.⁴² Marlow in turn gave the Fieldses oral permission to occupy the home, but did not execute a written agreement with them.⁴³ After moving in, the Fieldses made their rental payments directly to Conforti.⁴⁴ The Fieldses subsequently provided Conforti with written notice that

33. *Id.* (citing *Ferrell*, 751 N.E.2d at 712).

34. *Id.* at 42-45.

35. *Id.*

36. *Id.* at 44-45.

37. 868 N.E.2d 507 (Ind. Ct. App. 2007).

38. *See id.* at 514-15.

39. *Id.* at 511.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

they were exercising the option to purchase the property under the lease.⁴⁵ The Fieldses scheduled a closing, which Conforti did not attend.⁴⁶ The record showed that the Fieldses did not have the economic means to close, even if Conforti had attended.⁴⁷ Conforti then provided Marlow and the Fieldses with written notice that the lease had expired, that Marlow and the Fieldses were holdover tenants, and that their rent had been increased.⁴⁸ “The Fieldses responded by filing a complaint against Conforti for specific performance.”⁴⁹ Conforti gave written notice to Marlow and the Fieldses that they were in default for failing to pay the increased rent. The Fieldses did not vacate the property.⁵⁰ After a bench trial,

[t]he trial court concluded that: (1) the Fieldses were not entitled to specific performance because they were not parties to the Lease . . . ; (2) the Fieldses were sublessees pursuant to an oral agreement with Marlow; (3) both Marlow and the Fieldses were in default . . . and were liable to Conforti for the [increased rent]; (4) the Fieldses were liable for Conforti’s attorney fees . . . because the Fieldses ‘continued to litigate the action for specific performance after it should have become clear to them that they had no right to exercise the option to purchase under the Lease’; and (5) Marlow was liable for Conforti’s attorney fees . . . because of the prevailing party clause in the Lease.⁵¹

With respect to the Fieldses’ liability for the increased rent, the court of appeals found that there was no privity of contract or privity of estate between the Fieldses and Conforti, thus that conclusion by the trial court was clearly erroneous.⁵² The fact that the Fieldses paid their rent directly to Conforti did not create privity.⁵³

Marlow argued that he should not be liable for the increased rent because the failure to pay the full rental payments occurred after the term of the lease expired.⁵⁴ Although the parties did not cite any Indiana cases on point, the court was persuaded by a federal case that held:

[W]here a tenant subleases property, the tenant has a responsibility to see that the subtenant vacates the premises in order to surrender them to the landlord without further liability. If a subtenant holds over, it is effectively a holding over by the tenant, and the landlord can hold the

45. *Id.*

46. *Id.* at 511-12.

47. *Id.*

48. *Id.* at 512.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 513-14.

53. *Id.* at 514.

54. *Id.*

tenant liable for damages for the holdover period.⁵⁵

Marlow further argued that Conforti could not unilaterally increase the rent amount during the holdover period.⁵⁶ The court disagreed, citing precedent for the statement that “a month-to-month tenancy may be terminated *or the rent may be changed* by the landlord giving a one-month notice to the tenant.”⁵⁷ The court concluded that when Marlow received notice that the lease had expired, he could have paid the increased rent or vacated, but chose to do neither.⁵⁸

B. Material Breach of Lease

In *Collins v. McKinney*,⁵⁹ the court of appeals remanded the matter to the trial court for a determination of whether a sublease without landlord’s required permission was a material breach of the master lease.⁶⁰ Collins owned land in Fort Wayne which she leased to McKinney for a period of five years.⁶¹ The lease provided that McKinney could not assign or sublet without Collins’s prior written consent.⁶² McKinney sublet to Tomkinson Chrysler Jeep, Inc. (“Tomkinson”) with Collins’s permission.⁶³ Subsequently, Tomkinson entered into an asset purchase agreement with Glenbrook Dodge, Inc. (“Glenbrook”) whereby Tomkinson agreed to sell Glenbrook the auto dealership that it operated on the property owned by Collins.⁶⁴ After closing on the asset purchase agreement, Glenbrook began making the payments pursuant to the sublease between McKinney and Tomkinson, although Tomkinson did not formally assign the sublease to Glenbrook.⁶⁵

Shortly after the asset purchase agreement closed, Collins notified McKinney that she refused to consent to an assignment from Tomkinson to Glenbrook and that McKinney was in default of the master lease.⁶⁶ In response, McKinney initiated a declaratory judgment action.⁶⁷ Collins counterclaimed that McKinney was in breach of the master lease because Glenbrook was in possession of the property without Collins’s consent.⁶⁸ After a jury trial, McKinney filed a motion for a directed verdict, which the trial court granted, reasoning that there was no

55. *Young v. D.C.*, 752 A.2d 138, 142 (D.C. Cir. 2000) (citations omitted).

56. *Fields*, 868 N.E.2d at 515.

57. *Id.* (emphasis added) (citing *Speiser v. Addis*, 411 N.E.2d 439, 441 (Ind. Ct. App. 1980)).

58. *Id.*

59. 871 N.E.2d 363 (Ind. Ct. App. 2007).

60. *Id.* at 368, 371.

61. *Id.* at 366.

62. *Id.*

63. *Id.* at 366-67.

64. *Id.* at 367.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

breach of contract.⁶⁹ Collins appealed and McKinney cross-appealed the trial court's order that Collins's consent was required prior to any assignment or sublease of the sublease.⁷⁰

The court of appeals addressed two issues: whether damages were proper and whether the failure to obtain Collin's consent constituted a breach of the lease.⁷¹ On the damages issue, McKinney argued that because Collins "failed to produce any evidence of damage, devaluation, or waste due to the alleged breach by McKinney," Collins cannot recover for breach of contract.⁷² The court of appeals disagreed, finding that Collins was asking for and could receive the remedy of rescission.⁷³ "Rescission of a contract is not automatically available. However, if a breach of a contract is a material one which goes to the heart of the contract, rescission may be the proper remedy."⁷⁴

The court of appeals then turned to the question of whether there was a breach of the lease.⁷⁵ Although the court noted that construction of a written contract is generally a question of law, it concluded by remanding the matter back to the jury for a determination of whether the breach was material.⁷⁶

III. COMMON LAW

A. *Private Owner Liability for Sidewalks*

*Denison Parking, Inc. v. Davis*⁷⁷ addressed the liability of a private property owner to an individual who slipped and fell on ice on an adjoining sidewalk.⁷⁸ Davis parked her car at a garage managed by Denison Parking.⁷⁹ She then fell on a patch of ice located on the sidewalk near to the garage and injured herself.⁸⁰ Snow removal in that area was provided by Denison Parking.⁸¹ Denison Parking's policy, and its agreement with the Capital Improvement Board of Managers, stated that Denison Parking should "stay on top of snow removal" and "[r]emove snow and ice build-up that may restrict the safety of pedestrian traffic."⁸² Davis filed a complaint against Denison Parking, and Denison Parking

69. *Id.* at 368-69.

70. *Id.* at 369.

71. *Id.* at 369-76.

72. *Id.* at 370.

73. *Id.* at 370-71.

74. *Id.* (citing *Gabriel v. Windsor, Inc.*, 843 N.E.2d 29, 45 (Ind. Ct. App. 2006)).

75. *Id.* at 371.

76. *Id.* at 372, 376.

77. 861 N.E.2d 1276 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007).

78. *Id.* at 1277.

79. *Id.* at 1277-78.

80. *Id.*

81. *Id.*

82. *Id.* at 1278.

filed a motion for summary judgment.⁸³ The trial court denied Denison Parking's motion for summary judgment but granted Denison Parking's subsequent motion for an interlocutory appeal.⁸⁴

Denison Parking argued that the trial court erred in denying its motion for summary judgment because Denison Parking did not, as a matter of law, owe a duty to Davis nor did it assume a duty by creating an artificial condition that increased risk or proximately caused injury to Davis.⁸⁵ In order to establish a claim against Denison Parking, Davis had to show "that Denison Parking: (1) owed Davis a duty, (2) that Denison Parking breached its duty, and that (3) the breach proximately caused Davis's injuries."⁸⁶ Denison Parking argued that it did not owe Davis a common law or statutory duty to clear the public sidewalks of ice and snow, nor did it assume such a duty.⁸⁷ The court of appeals found that Denison Parking did not owe a common law or statutory duty of care to Davis because Denison Parking is a private owner, not a municipality.⁸⁸ Although Davis pointed to Indianapolis Municipal Code section 931-102 to show that Denison Parking had a duty to clear the sidewalk,⁸⁹ the court noted that ordinances such as this one "are *not* enacted for the protection of individuals using the streets, but rather are for the benefit of the municipality."⁹⁰ Finally, the court noted that in Indiana, "persons are held to have assumed a duty to pedestrians on a public sidewalk *only* when they create artificial conditions that increase risk and proximately cause injury to persons using those sidewalks."⁹¹ In this case, the court found no designated evidence that Denison Parking had created such an artificial condition.⁹² The court reversed and remanded with instructions to grant Denison Parking's motion for summary judgment.⁹³

IV. REAL ESTATE CONTRACTS

A. *Equity of Forfeiture*

Keene ("Seller") and Armstrong ("Buyer") were parties to a conditional contract for the sale of a restaurant and tavern in Marion.⁹⁴ The purchase price

83. *Id.*

84. *Id.*

85. *Id.* at 1279.

86. *Id.*

87. *Id.*

88. *Id.* at 1280.

89. REV. CODE OF THE CONSOL. CITY AND COUNTY INDIANAPOLIS/MARION, IND. § 931-102 (2007).

90. *Davis*, 861 N.E.2d at 1281.

91. *Id.* at 1280 (citing *Lawson v. Lafayette Home Hosp., Inc.*, 760 N.E.2d 1126, 1130 (Ind. Ct. App. 2002)).

92. *Id.*

93. *Id.* at 1281-82.

94. *Armstrong v. Keene*, 861 N.E.2d 1198 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205

was to be paid in a down payment and monthly payments (including interest) over a period of fifteen years.⁹⁵ The contract called for Buyer to pay real estate taxes and insurance and contained a forfeiture clause which provided that if Buyer failed to make the required payments for a period of thirty days after due, then the agreement “shall become null and void, at the option of the SELLER,” whereby Buyer was required to surrender the real estate to Seller.⁹⁶ Approximately seven years after the contract was signed, Buyer failed to make the monthly payments and pay the real estate taxes. Seller sent Buyer a letter informing him of the default.⁹⁷ “At the time of the default, Buyer had paid approximately \$43,000 in principal.”⁹⁸ Several months later, Buyer executed a bill of sale to Seller whereby he granted all of his interest in the real estate, improvements, and personal property to Seller.⁹⁹ Buyer also conveyed the liquor license back to Seller.¹⁰⁰ Approximately eighteen months later, a fire destroyed the bar, and Seller allegedly received \$179,000 from insurance proceeds and from the sale of the real estate and liquor license.¹⁰¹

Buyer filed a complaint for breach of contract against Seller, alleging that Seller had orally promised to pay him \$25,000 for Buyer’s interest in the bar, but that Seller had not paid him the money.¹⁰² In the alternative, Buyer alleged that he was entitled to foreclosure of the real estate.¹⁰³ Seller filed for summary judgment.¹⁰⁴ Buyer filed his own motion for summary judgment, arguing that he was entitled to foreclosure pursuant to *Skendzel v. Marshall*.¹⁰⁵ The trial court ruled that the alleged oral agreement between the parties was unenforceable and that *Skendzel* does not apply where Buyer voluntarily abandoned and relinquished his interest in the property.¹⁰⁶ Buyer appealed.¹⁰⁷

On appeal, the buyer relied on *Skendzel*, a case in which “the Indiana Supreme Court addressed the equity of forfeiture as a remedy in land contracts.”¹⁰⁸ The court noted that forfeitures are generally disfavored by law because a significant injustice results where the buyer has a substantial interest in the property.¹⁰⁹ The court concluded that land sales contracts are akin to

(Ind. 2007).

95. *Id.* at 1199.

96. *Id.* at 1199-1200.

97. *Id.* at 1200.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1200 (citing *Skendzel v. Marshall*, 301 N.E.2d 641 (Ind. 1973)).

106. *Id.*

107. *Id.*

108. *Id.* at 1201 (footnote omitted).

109. *Id.*

mortgages, and therefore the remedy of foreclosure is preferred.¹¹⁰ In *Armstrong*, the court of appeals agreed with Seller that *Skendzel* does not apply because the Buyer signed the bill of sale voluntarily.¹¹¹ There was no forfeiture.¹¹² The court cited Justice Prentice's concurrence in *Skendzel*: "It follows that if the vendee has indicated his willingness to forego his equity, if any, whether by mere abandonment of the premises, *by release or deed* or by failure to make a timely assertion of his claim, he should be barred from thereafter claiming an equity."¹¹³

B. Boundary Description

*Schuler v. Graf*¹¹⁴ addressed an unclear boundary description in a real estate contract.¹¹⁵ Schuler owned a 149-acre tract of land. Graf expressed interest in purchasing approximately eleven acres of the tract.¹¹⁶ Schuler and Graf walked the property and discussed the boundaries of the parcel to be sold.¹¹⁷ During this discussion, a fence post was spray painted to indicate one boundary, and a line was drawn in the dirt to indicate another boundary.¹¹⁸ Schuler and Graf subsequently entered into a land contract which stated that "[t]he boundaries of the two parcels have been agreed upon by the parties" and that the exact acreage would be determined by a survey.¹¹⁹ Graf paid the earnest money to Schuler.¹²⁰ After Graf's surveyor prepared a survey, Schuler sent notice that the legal description was not accurate and that the contract did not reflect a meeting of the minds.¹²¹ Schuler refused to complete the paperwork required to subdivide the smaller parcel from the larger tract and indicated to Graf that she no longer wished to sell.¹²² Graf filed a complaint for specific performance of the contract.¹²³ Schuler asserted that the contract failed to satisfy the statute of frauds because it did not contain a metes and bounds description of the real estate and that there was no meeting of the minds regarding the boundaries of the parcel.¹²⁴ Following testimony by both Schuler and Graf regarding their

110. *Id.*

111. *Id.* at 1202.

112. *Id.*

113. *Id.* (quoting *Skendzel v. Marshall*, 301 N.E.2d 641, 651 (Ind. 1973) (Prentice, J., concurring) (emphasis added)).

114. 862 N.E.2d 708 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 461 (Ind. 2007).

115. *Id.*

116. *Id.* at 710.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 711.

123. *Id.*

124. *Id.*

discussions of the property lines, the trial court concluded that there was a meeting of the minds and ordered specific performance.¹²⁵ Schuler appealed.¹²⁶

On appeal, Schuler argued that the trial court erred in ordering specific performance because the contract did not satisfy the statute of frauds as it did not provide a legal description of the real estate to be sold.¹²⁷ The court cited case law for the proposition that an agreement must “completely contain the essential terms *without resort to parol evidence* in order to be enforceable.”¹²⁸ Regarding the description of land, the court cited a previous case which held that a description of property “may be abstract and of a general nature, if with the assistance of external evidence the description, without being contradicted or added to, can be connected with and applied to the very property intended, *to the exclusion of all other property.*”¹²⁹ The court noted:

In this case, the Contract only describes the property to be sold in terms of acreage, without providing boundaries, making it impossible from the initial description given to determine exactly where in Schuler’s 149 acre property the approximate [eleven] acres to be sold are located. The Contract therefore does not appear to satisfy the Statute where, without more, it only describes the parcels in terms of acreage.¹³⁰

Because the survey referred to in the contract was not completed at the time the contract was signed, the court reasoned that it could not furnish the means of identification necessary to identify the parcel.¹³¹ The court concluded, however, that the contract furnished the means of identification—the agreement of the parties.¹³² Accordingly, the court held that the contract did satisfy the statute of frauds.¹³³ Since the contract was complete, parol evidence was properly admitted to “complete the legal description” of the parcel.¹³⁴ The court noted that Schuler and Graf both testified that they “essentially agreed” on the boundaries of the parcel.¹³⁵

In the alternative, Schuler argued that even if the contract did not violate the statute of frauds, there was no meeting of the minds sufficient to order specific performance.¹³⁶ Specifically, Schuler argued that there was no meeting of the

125. *Id.* at 711-12.

126. *Id.* at 712.

127. *Id.*

128. *Id.* at 713 (quoting *Coca-Cola Co. v. Babyback’s Int’l, Inc.*, 841 N.E.2d 557, 565 (Ind. 2006) (emphasis added)).

129. *Id.* (quoting *Cripe v. Coates*, 116 N.E.2d 642, 644-45 (Ind. App. 1954)).

130. *Id.* at 714.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 715.

minds regarding the location of the eastern boundary.¹³⁷ The first survey prepared by Graf was later revised by Graf to “correct” the location of the eastern boundary.¹³⁸ The court held that the fact “[t]hat the first survey did not accurately reflect the parties’ agreement does not constitute a failure to come to a meeting of the minds at the time the parties entered into the Contract.”¹³⁹

V. TAX SALES

The Indiana appellate courts issued several opinions regarding tax sales during the survey period, including one opinion by the Indiana Supreme Court.

A. *Partial Refund Under Indiana Code Section 6-1.1-25-4.6(d)*

In *In re Parcels Sold for Delinquent Taxes*,¹⁴⁰ the Indiana Supreme Court held that “a purchaser at a tax sale who does not seek an order to issue a deed is not entitled to the partial refund of the purchase price provided in Indiana Code section 6-1.1-25-4.6(d).”¹⁴¹ Michiana Campgrounds, LLC (“Michiana”) bought several properties at a tax sale in 2004.¹⁴² Before the redemption period had expired, Michiana filed motions for refunds of the purchase price, minus a twenty-five percent penalty.¹⁴³ Indiana Code section 6-1.1-25-4.6 provided at the relevant time that a petitioner could obtain such a refund “if the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the failure of the petitioner under subsection (a) to fulfill the requirements of this section.”¹⁴⁴ In response to Michiana’s motion, the trial court ordered the Vanderburgh County Auditor (“Auditor”) to refund the purchase price minus the penalty.¹⁴⁵ The appellate court affirmed, and the Indiana Supreme Court accepted the petition to transfer.¹⁴⁶

The Auditor argued that a petitioner is only entitled to a refund under section 4.6 if it attempts to obtain a deed but the trial court refuses.¹⁴⁷ The Indiana Supreme Court agreed: “We think that the statutory reference to ‘refusal’ purposefully limits refunds to purchasers who go to the time and expense of seeking a deed. Buyer’s remorse is not a basis for a refund.”¹⁴⁸ The court unanimously reversed the decision of the trial court.¹⁴⁹

137. *Id.*

138. *Id.*

139. *Id.*

140. 873 N.E.2d 1051 (Ind. 2007).

141. *Id.* at 1051.

142. *Id.* at 1052.

143. *Id.*

144. *Id.* at 1051-52 (citing IND. CODE § 6-1.1-25-4.6(d) (2000)).

145. *Id.* at 1052.

146. *Id.*

147. *Id.*

148. *Id.* at 1054.

149. *Id.* at 1055.

In *Whalen v. M. Doed, LLC*,¹⁵⁰ the Indiana Court of Appeals addressed whether a tax deed should have been set aside following confusion regarding whether the delinquent property taxes at issue were listed as proceeds in a bankruptcy action.¹⁵¹ Whalen owned property in Muncie upon which he failed to pay property taxes.¹⁵² The property was sold at a tax sale in October 2002 to Doed.¹⁵³ The following year, Whalen informed the county treasurer and auditor that he had filed for bankruptcy.¹⁵⁴ The County invalidated the tax sale and returned the proceeds to Doed.¹⁵⁵ Later, the County learned that Whalen never properly listed the delinquent property taxes in the bankruptcy action, and it reinstated the tax sale.¹⁵⁶ Doed repaid the proceeds to the County.¹⁵⁷ Whalen filed an action to re-invalidate the tax sale.¹⁵⁸ Following judgment in favor of Doed at the trial court level, Whalen appealed.¹⁵⁹ The court of appeals found that the tax deed did not suffer from any of the fatal defects set forth in Indiana Code section 6-1.1-25-16¹⁶⁰ and that Whalen was not entitled to have the tax deed set aside.¹⁶¹ With respect to Whalen's claim of equitable estoppel, the court of appeals agreed with the trial court that although there was confusion in the auditor and treasurer's offices regarding Whalen's claims that the property was included in the bankruptcy action, none of the county officials misled Whalen into believing that he would not have to redeem his property.¹⁶² The decision of the trial court was upheld.¹⁶³

B. Priority of Tax Deeds

In *MJ Acquisitions, Inc. v. Tec Investments, LLC*,¹⁶⁴ the Indiana Court of Appeals addressed a situation in which a county placed the same property on the tax sale list in two consecutive years, even though the entity that purchased the property at the first tax sale overbid in an amount sufficient to pay the later tax debt.¹⁶⁵ Husk owned property that was included in the 2003 tax sale based on

150. 859 N.E.2d 368 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 454 (Ind. 2007).

151. *Id.*

152. *Id.* at 369.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 370.

157. *Id.*

158. *Id.*

159. *Id.* at 369.

160. IND. CODE § 6-1.1-25-16 (2000).

161. *Whalen*, 859 N.E.2d at 374.

162. *Id.* at 375.

163. *Id.*

164. 863 N.E.2d 379 (Ind. Ct. App. 2007)

165. *Id.*

delinquent 2000 and 2001 taxes.¹⁶⁶ At the start of the sale, the auditor announced that additional taxes would be due and owing shortly after the sale due to the 2002 reassessment.¹⁶⁷ MJ Acquisitions, Inc. ("MJ") was the highest bidder with an overbid amount of over \$43,000.¹⁶⁸ In 2004, the property was again placed on the delinquent tax list as a result of unpaid taxes accrued in 2002 payable in 2003, as well as those accrued in 2003 and payable in 2004.¹⁶⁹ The property was again sold at a 2004 tax sale.¹⁷⁰ Notice of the 2004 sale was sent to Husk as the record owner.¹⁷¹ Tec Investments, LLC ("Tec") was the highest bidder at the sale, purchasing the property for the minimum bid of \$5,292.82.¹⁷² Following the sale, MJ filed a petition for a tax deed.¹⁷³ Later, Tec sent notices to Husk and MJ informing them of the 2004 tax sale and the expiration date for the redemption period.¹⁷⁴ Following the expiration of the redemption period, MJ filed its verified objection to Tec's petition.¹⁷⁵ A few days later, the auditor issued a tax deed to MJ based on the 2003 sale.¹⁷⁶ A few months later, the trial court held a hearing and entered an order directing the auditor to issue a tax deed to Tec for the 2004 tax sale.¹⁷⁷

On appeal, MJ argued that the property should not have been included in the 2004 tax sale.¹⁷⁸ The court noted that the treasurer was required to have applied a portion of MJ's surplus from the overbid to the 2002 taxes payable in 2003.¹⁷⁹ In addition, the court noted that the taxes due and owing in 2004 were not grounds for including the property on the delinquency list for the 2004 tax sale.¹⁸⁰ Finally, Tec argued that its 2004 tax deed should have priority over the 2003 tax deed pursuant to Indiana Code section 6-1.1-24-12.¹⁸¹ However, the court reasoned that, had the treasurer properly applied the surplus to the taxes due in 2003, there would have been no "delinquency" from 2003 to place the property in the 2004 tax sale.¹⁸² Accordingly, the property was not properly placed in the tax sale and the priority set forth within the Indiana Code does not apply.¹⁸³ The

166. *Id.* at 380.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 380-81.

171. *Id.* at 381.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 384.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 385.

183. *Id.*

court reversed and remanded with instructions to set aside Tec's petition for the issuance of a tax deed.¹⁸⁴

VI. LIENS AND MORTGAGES

A. *Per Diem Late Fees as Unenforceable Penalties*

*Harbours Condominium Ass'n v. Hudson*¹⁸⁵ raises several interesting questions, chiefly whether a set per diem late fee is always an unenforceable penalty.¹⁸⁶ The Declaration of the Harbours Horizontal Property Regime and the Third Amendment to the Declaration provided that if assessments were not paid when due, the delinquent owner would be charged a late fee of at least \$25 plus an additional \$5 per day until paid in full.¹⁸⁷ Additionally, the owner would be required to pay the Harbours Condominium Association's ("Association") attorneys fees if incurred as a result of a delinquency.¹⁸⁸ Furthermore, all late assessments were subject to interest at a rate equal to the lesser of (i) the maximum amount allowed by law or (ii) 18%.¹⁸⁹ All assessments, interest, costs, and expenses constituted a lien on the owner's unit and could be foreclosed upon.¹⁹⁰

In 2002, the assessment and dues for Hudson's unit were \$323.40 per month.¹⁹¹ "On October 10, 2002, Hudson paid to the Association \$646.80," a payment that she believed made her current with the Association.¹⁹² However, the Association claimed that this payment only made her current through July 2002.¹⁹³ Hudson had a \$10,000 escrow held by the Harbours's attorney from an earlier dispute between the parties.¹⁹⁴ Hudson made no further payments of assessments or dues, believing that the amounts would be deducted from the escrow.¹⁹⁵ In October 2003, the Association's attorney informed Hudson's counsel that the escrow would be disbursed to the Association and deducted from Hudson's accumulated delinquent assessments, which, according to the attached schedule, then totaled over \$16,750.¹⁹⁶ In December 2003, the Association filed a notice of condominium lien and, in January 2004, "filed suit against Hudson, seeking a money judgment in the amount of \$7325.86 plus continuing monthly

184. *Id.* at 386.

185. 852 N.E.2d 985 (Ind. Ct. App. 2006).

186. *Id.*

187. *Id.* at 987.

188. *Id.*

189. *Id.*

190. *Id.* at 987-88.

191. *Id.* at 988 n.1.

192. *Id.* at 988.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

fees, costs and attorney's fees and also seeking foreclosure of its lien."¹⁹⁷ At trial, the Association claimed that Hudson owed \$26,000 in October 2003 and "that, at the time of the trial, Hudson owed \$74,154.24 in monthly assessments and late fees from December 2003 through February 15, 2005."¹⁹⁸ The trial court denied the Association's attempted foreclosure of the condominium lien, but found that the Association had sustained actual damages in the amount of \$7117.29 and that Hudson owed the Association only \$799.12.¹⁹⁹

On appeal, the Association claimed *inter alia* that the trial court erred when it denied the Association's request to foreclose on the condominium lien.²⁰⁰ Hudson argued that the statute does not mandate foreclosure.²⁰¹ The court of appeals agreed with the Association that the trial court should have decreed foreclosure of the Association's lien pursuant to the Indiana Horizontal Property Law.²⁰² The court, however, found that the error was harmless because Hudson immediately paid the amounts awarded to the Association by the trial court.²⁰³ The Association was in the same position as it would have been if the trial court had foreclosed the lien.²⁰⁴

The Association also argued that the trial court erred when it found that the late fees charged by the Association constitute an unenforceable penalty.²⁰⁵ Instead, the Association claimed that the late fees were appropriate liquidated damages.²⁰⁶ Under the formula contained in the Association's declaration, interest and late fees on the condominium lien amount of \$7,235.80 totaled \$66,828.44.²⁰⁷ The court of appeals found that these late fees constituted an unenforceable penalty "because they are grossly disproportionate to the actual damages suffered by the Association as a result of Hudson's delinquencies."²⁰⁸ The trial court found that the Association's actual damages were \$7117.29, which consisted of \$3616.50 in attorney's fees and \$3500.79 in administrative costs of collection.²⁰⁹ The court of appeals noted that there is some contradiction in the rules that distinguish liquidated damages from an unenforceable penalty.²¹⁰ A party seeking to enforce liquidated damages need not prove actual damages, but may be required to show a correlation between the liquidated damages and

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 990-91.

201. *Id.* at 991.

202. *Id.* at 990.

203. *Id.* at 990-91.

204. *Id.* at 991.

205. *Id.*

206. *Id.*

207. *Id.* at 992.

208. *Id.*

209. *Id.*

210. *Id.* at 993.

actual damages.²¹¹ Given the disconnect between the Association's actual damages and the late fees, the court of appeals agreed with the trial court that they were much more akin to a penalty.²¹²

B. Judge May Use Personal Experiences

*Clark v. Hunter*²¹³ is interesting for two reasons. First, the court of appeals ruled that a judge can use his own personal experience to assess the evidence.²¹⁴ Second, the case illustrated a typographical error made during the recodification of Title 32, which has since been fixed by the Indiana General Assembly.²¹⁵

Clark was engaged by Hunter to perform as the electrical subcontractor in the construction of Hunter's home.²¹⁶ Payment was to be made in two installments.²¹⁷ Hunter made the first payment, but a subsequent dispute arose between Hunter and Clark about the timing and quality of Clark's remaining work.²¹⁸ Clark filed a notice of its intent to hold a mechanic's lien and then filed suit to foreclose on its lien.²¹⁹ Clark sought to recover the remaining value of the contract, plus attorneys fees and prejudgment interest.²²⁰ At trial, Hunter's expert testified that Clark's work was "inadequate" in several material respects.²²¹ The trial court issued the following finding: "8. That the Court would note that the Judge of this matter was previously involved in the building business and that as presented, it appears that 80% of the work was completed by and for defendant."²²² The trial court did not foreclose on the mechanic's lien, but awarded Clark 80% of the total value of the contract, minus amounts already paid by Hunter, plus court costs.²²³ Clark was not awarded prejudgment interest or attorneys fees.²²⁴

Clark contended on appeal that the trial court judge committed reversible error by considering his personal experiences in finding that Clark had completed only 80% of the work.²²⁵ The court of appeals disagreed, reasoning that the trial judge is "permitted to utilize his own life experiences" in weighing the evidence

211. *Id.*

212. *Id.* at 992.

213. 861 N.E.2d 1202 (Ind. Ct. App. 2007).

214. *Id.* at 1206-07.

215. *Id.* at 1210-11.

216. *Id.* at 1205.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 1205-06.

221. *Id.* at 1205.

222. *Id.* at 1206.

223. *Id.*

224. *Id.*

225. *Id.*

and that there was sufficient evidence to support the judgement.²²⁶

With respect to Clark's claim for prejudgment interest, the court of appeals noted that prejudgment interest is "proper where the trier of fact need not exercise its judgment to assess the amount of damages."²²⁷ On the other hand, "[d]amages that are the subject of a good faith dispute cannot allow for an award of predjudgment interest."²²⁸

On Clark's third claim, that the trial court erred when it did not order foreclosure of the mechanic's lien, the court of appeals sided with Clark, holding that the trial court was required to foreclose the lien to comply with the statute.²²⁹ Accordingly, the court of appeals reversed and remanded with instructions that the trial court order the sale of the property subject to the lien.²³⁰

Finally, Clark argued that the mechanic's lien statute mandates the award of attorney's fees upon foreclosure of a lien.²³¹ Hunter argued that prior to the 2002 recodification of title 32, former Indiana Code section 32-8-3-14 provided that "[i]n all suits brought for the enforcement of any lien under the provisions of this chapter, if the plaintiff or lienholder shall recover judgment in any sum, he *shall* also be entitled to recover reasonable attorney's fees."²³² The recodified section, now found at Indiana Code section 32-28-3-14(a), reads: "'in an action to enforce a lien under this chapter, the plaintiff or lienholder *may* recover reasonable attorney's fees as a part of the judgement."²³³ Hunter argued that the switch from "shall" to "may" made the award of attorney's fees discretionary rather than mandatory.²³⁴ The court of appeals disagreed, citing Indiana Code section 32-16-1-1, which provides that the intent of the recodification of title 32 was not intended to result in a substantive change in prior property law and that if the literal meaning of a section changed, it should be regarded as a typographical or other clerical error.²³⁵ In other words, the court of appeals reasoned, the discretionary "may" must be read as the mandatory "shall."²³⁶

The court of appeals remanded to the trial court with instructions that the lien's priority be determined, that a judgment for attorney's fees be entered for Clark in the amount of \$3109.20, and that a decree of foreclosure be entered to

226. *Id.* at 1206-07.

227. *Id.* at 1208 (quoting *J.S. Sweet Co. v. White County Bridge Comm'n*, 714 N.E.2d 219, 225 (Ind. Ct. App. 1999)).

228. *Id.* (quoting *Bopp v. Brames*, 713 N.E.2d 866, 872 (Ind. Ct. App. 1999) (citations omitted)).

229. *Id.* at 1208-09.

230. *Id.* at 1209.

231. *Id.*

232. *Id.* (quoting IND. CODE § 32-8-3-14 (2002) (emphasis added)).

233. *Id.* (quoting IND. CODE § 32-8-3-14(a) (2004) (emphasis added)).

234. *Id.* at 1210.

235. *Id.* (citing IND. CODE § 32-16-1-1 (2004)).

236. *Id.* In the 2007 Technical Corrections bill, the Indiana General Assembly amended Indiana Code section 32-28-3-14(a) to change the "may" back to "shall." See IND. CODE § 32-28-3-14(a) (Supp. 2007); 2007 Ind. Legis. Serv. 1 (West).

satisfy both the \$2952 determined by the trial court and the attorney's fees.²³⁷

C. Failure to Process Mortgage Payoff

In *Dreibelbiss Title Co. v. MorEquity, Inc.*,²³⁸ the court of appeals once again addressed a case in which the title company did not properly process the payoff of a loan before issuing a lender's title policy which purported to assure that a subsequent mortgage had first priority.²³⁹

The Youngs owned a home subject to two mortgages in favor of KeyBank, securing a fixed sum note and a home equity line of credit.²⁴⁰ The Youngs sought to refinance with MorEquity, which engaged Dreibelbiss Title Company ("Dreibelbiss") to provide a lender's policy of title insurance.²⁴¹ Dreibelbiss obtained a payoff letter from KeyBank for the two mortgages, plus instructions that KeyBank would require written instructions from the Youngs to close the line of credit and release the mortgage securing it.²⁴² Dreibelbiss arranged for the payoff but did not provide KeyBank with any written instructions from the Youngs.²⁴³ Accordingly, KeyBank released the first mortgage, but not the second.²⁴⁴ The Youngs drew money on the KeyBank line of credit and defaulted.²⁴⁵ KeyBank foreclosed on the property, taking the position that it held the first lien.²⁴⁶ MorEquity did not dispute that it was the junior lienholder.²⁴⁷ Foreclosure of the Youngs' property did not realize sufficient proceeds to make any payment to MorEquity.²⁴⁸ Subsequently, MorEquity filed a complaint against Dreibelbiss under the title policy, asking for damages in the amount of MorEquity's lien.²⁴⁹ The trial court found in favor of MorEquity.²⁵⁰

On appeal, the appellate court upheld the trial court decision, including its calculation of damages in the amount of the MorEquity lien.²⁵¹ Dreibelbiss argued that the damages should be the amount of the KeyBank lien, but did not specify the value of that lien.²⁵² Dreibelbiss cited policy language that its liability "shall not exceed the least of . . . the difference between the value of the insured

237. *Clark*, 861 N.E.2d at 1211.

238. 861 N.E.2d 1218 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 461 (Ind. 2007).

239. *Id.* at 1219-20.

240. *Id.* at 1219.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 1220.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 1219.

251. *Id.* at 1222.

252. *Id.*

estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.”²⁵³ In other words, the damages that a title policyholder was entitled to obtain represent the difference in the value of the property with and without the lien or encumbrance that the title company failed to disclose. For example, if the KeyBank lien was \$100,000 and the net proceeds from foreclosure were \$232,000, a strict application of that language would seem to state that MorEquity would have had no damages, because its \$132,000 lien could have been fully satisfied. However, if the KeyBank lien was \$100,000 and the net proceeds from foreclosure were only \$100,000, MorEquity would have damages equal to \$100,000—the value of the undisclosed lien that took priority over its lien. It is unclear how the court could reason that MorEquity could be entitled to damages of \$132,000 if the property sold for less than that amount, since it could not have been made whole even if it had held the first lien. Nonetheless, the court did not mention the value of the KeyBank lien nor the net proceeds from the sale, except to state that MorEquity received no proceeds.²⁵⁴ The court’s reasoning here seems dissonant with the popular understanding of the recovery provisions in title insurance policies.

D. Alternation of a Promissory Note

In *Keesling v. T.E.K. Partners, LLC*,²⁵⁵ the court of appeals analyzed whether the capitalization of interest was a material alteration of a promissory note that required the consent of the guarantors in order to bind them to a revised note.²⁵⁶

Heritage/M.G. executed a promissory note to Henke to partially finance the development of a residential subdivision.²⁵⁷ The note was signed by four individuals (Green, McMullen, Larry Keesling, and Vivian Keesling), both in their individual capacities and on behalf of Heritage/M.G. and its partners.²⁵⁸ The note was secured by a mortgage on property in Delaware County.²⁵⁹ Heritage/M.G. did not fulfill its payment obligations in a timely manner.²⁶⁰ “Without the Keeslings’ knowledge or consent, R.M.G. Investment Group, L.L.C. (“R.M.G.”) whose principals include Green and McMullen, purchased the note” from Henke, and Henke assigned the note and mortgage to R.M.G.²⁶¹ R.M.G. subsequently assigned the note and mortgage back to Henke.²⁶² In

253. *Id.*

254. *Id.*

255. 861 N.E.2d 1246 (Ind. Ct. App. 2007), *appeal after remand*, 881 N.E.2d 1025 (Ind. Ct. App. 2008).

256. *Id.* at 1249.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

addition, without the knowledge or consent of the Keeslings or Heritage Land, Heritage/M.G. executed a second note to Henke.²⁶³ The second note provided that it was secured by the original mortgage.²⁶⁴ “Green and McMullen personally guaranteed the second note. No payments were ever made on the second note.”²⁶⁵ Henke filed to foreclose the mortgages and for judgment against the Keeslings, Heritage/M.G., Green, and McMullen.²⁶⁶ Later, Henke assigned the note and mortgage to T.E.K. Partners and released Green and McMullen from any liability.²⁶⁷ Following a bench trial, the trial court entered judgment for T.E.K. against each of the defendants.²⁶⁸ The Keeslings and Heritage Land then appealed.²⁶⁹

The Keeslings and Heritage Land argued that because they were accommodation parties on the original note and the second note constituted a material alteration of the original note, they were discharged from further personal liability under the original note and had no liability under the second note.²⁷⁰ The court of appeals explained the black letter law regarding guaranty contracts at length and noted that “[a] guarantor is a favorite in the law and is not bound beyond the strict terms of the engagement. Moreover, a guaranty of a particular debt does not extend to other indebtedness not within the manifest intention of the parties.”²⁷¹ Since the Heritage/M.G. was the principal obligor and the Keeslings were guarantors on the original note, they and Heritage Land were accommodation parties.²⁷² The trial court found that the mortgage provided that Henke could advance additional funds.²⁷³ The court of appeals, however, pointed out that the mortgage was not a negotiable instrument and merely secured the debt under the original debt.²⁷⁴ It did not constitute a promise to pay and did not serve to authorize Henke to obligate the Keeslings further without their knowledge or consent.²⁷⁵ Therefore, the court concluded, “the mortgage itself provides no grounds for holding either the Keeslings or Heritage Land liable for funds advanced under the second note.”²⁷⁶

T.E.K. argued that the second note was not a material alteration of the original note because it merely restated the original borrowers’ then-current

263. *Id.*

264. *Id.*

265. *Id.* at 1249-50.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 1251 (quoting *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580, 586 (Ind. Ct. App. 2001) (emphasis added)).

272. *Id.*

273. *Id.* at 1252.

274. *Id.*

275. *Id.*

276. *Id.*

obligation.²⁷⁷ However, the court noted the second note included additional money to “pay the bills” as well as capitalized interest.²⁷⁸ This capitalization of interest, the court concluded, was a material alteration of the first note that required the consent of the guarantors in order to bind them.²⁷⁹ The result was that the court discharged the Keeslings and Heritage Land from their personal liability on the first note and found that they had no liability for the additional sums advanced under the second note.²⁸⁰

E. Preparation of Loan Documents

In *Charter One Mortgage Corp. v. Condra*,²⁸¹ the Indiana Supreme Court ruled that a bank may charge a fee related to the preparation of legal documents related to a loan and that charging for such a service does not constitute the unauthorized practice of law.²⁸²

Condra borrowed money from Charter One Mortgage Corporation (“Charter One”), secured by a mortgage on real property.²⁸³ At the closing, “Charter One charged Condra a \$175 fee for the completion of a deed and mortgage. These documents were prepared by Charter One’s agents or employees who were not licensed to practice law.”²⁸⁴ Condra filed a class action, arguing that Charter One’s document preparation fee was not permitted under Indiana law “because charging a fee for documents prepared by non-lawyers constituted the unauthorized practice of law.”²⁸⁵ Charter One asked the trial court to dismiss the action under Indiana Trial Rule 12(B)(6).²⁸⁶ Charter One argued that it was a subsidiary of a national bank and was therefore governed by federal regulations with respect to banking.²⁸⁷ These regulations include “a provision that allows national banks and their operating subsidiaries to charge incidental fees for legal services provided by non-lawyers in the preparation of real estate loan documents.”²⁸⁸ Charter One contended that these federal regulations preempted any conflicting state law.²⁸⁹ “The trial court denied the motion but certified its order for an interlocutory appeal.”²⁹⁰ The court of appeals affirmed, holding that the Indiana Supreme Court’s “jurisdiction over the unauthorized practice of law

277. *Id.* at 1253.

278. *Id.*

279. *Id.*

280. *Id.* at 1254.

281. 865 N.E.2d 602 (Ind. 2007).

282. *Id.* at 607.

283. *Id.* at 604.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

is not preempted by the federal regulations.”²⁹¹ The Indiana Supreme Court granted transfer.²⁹²

The court noted that it “has original jurisdiction over ‘the unauthorized practice of law’”²⁹³ and that it is the responsibility of the court to “determine what acts constitute the practice of law.”²⁹⁴ After discussing the public policy reasons behind confining the practice of law to licensed attorneys, the court concluded that “if the completion of legal documents is ordinarily incident to a lender’s financing activities, it is generally not the practice of law, whether or not a fee is charged.”²⁹⁵ Further, the court “disapproved” of the case relied upon by *Condra*.²⁹⁶

F. Equitable Subrogation

In *Gibson v. Neu*,²⁹⁷ the court of appeals analyzed the doctrine of equitable subrogation in Indiana following the Indiana Supreme Court’s 2005 decision in *Bank of New York v. Nally*.²⁹⁸

Nowak executed a promissory note to Gibson, secured by mortgages on Nowak’s two residences.²⁹⁹ The note required Nowak to make monthly payments for several years with a final balloon payment.³⁰⁰ The mortgage on Nowak’s Indiana property provided that if Nowak sold the property before the note was fully paid, Gibson would release the mortgage if Nowak had not defaulted on his obligations to Gibson and was current in his payments.³⁰¹ At the time that Gibson recorded his mortgage on Nowak’s Indiana property, Irwin Mortgage Corporation (“Irwin Mortgage”) held a first mortgage on the property.³⁰² Nowak made five payments to Gibson, then, without informing Gibson, sold his Indiana property to the Neus.³⁰³ The title company found the Irwin mortgage, but not the Gibson mortgage.³⁰⁴ The Neus borrowed money to finance the acquisition, and their lender, Washington Mutual Bank (“Washington Mutual”), placed a mortgage on the property at closing.³⁰⁵ Following the sale, Nowak made four

291. *Id.*

292. *Id.*

293. *Id.* (quoting IND. CONST. art. 7, § 4).

294. *Id.* at 605 (citing IND. CONST. art. 7, § 4; *Alvarado v. Nagy*, 819 N.E.2d 520, 523 (Ind. Ct. App. 2004)).

295. *Id.* at 607.

296. *Id.* (citing *Miller v. Vance*, 463 N.E.2d 250 (Ind. 1984)).

297. 867 N.E.2d 188 (Ind. Ct. App. 2007).

298. 820 N.E.2d 644 (Ind. 2005).

299. *Gibson*, 867 N.E.2d at 190.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 191.

304. *Id.*

305. *Id.*

more payments to Gibson.³⁰⁶ Gibson filed a complaint for judgment on the note and for foreclosure of his mortgage against Nowak, the Neus, and Washington Mutual.³⁰⁷ Nowak subsequently filed for bankruptcy.³⁰⁸ The Neus filed their own motion for summary judgment, arguing “that Nowak was not in default on the note at the time he sold the property to the Neus or, alternatively, that Nowak was in substantial compliance, and that Gibson would have been required to release his mortgage.”³⁰⁹ In addition, the Neus “argued that they had priority over Gibson’s mortgage under the doctrine of equitable subrogation.”³¹⁰ The trial court denied Gibson’s motion for summary judgment and granted summary judgment to the Neus.³¹¹

On the Neus’ first argument, the trial court found that Nowak had substantially complied with the payment terms of the mortgage and that Gibson would have been required to release the mortgage if he had been asked to do so.³¹² On appeal, Gibson argued that “Nowak was in default under the note and mortgage by his failure to make full and timely payments, that Nowak was not entitled to notice [of his default] under the note and mortgage, and that the doctrine of substantial performance does not apply to a note and mortgage.”³¹³ The court of appeals noted that the evidence presented to the trial court was that Nowak was in default at the time of the sale to the Neus and that his subsequent payment did not cure that default.³¹⁴ In its application of the doctrine of substantial performance, the court reiterated that timely payment of the debt was an “essential condition” of the note and mortgage.³¹⁵ Since Nowak was not current in his payments at the time of the sale to the Neus, he was not entitled to a release by Gibson, and the doctrine of substantial performance was inapplicable.³¹⁶

On the issue of equitable subrogation, the trial court found that the Neus would have been entitled to assume the first lien position of Irwin Mortgage because “[t]he Gibson mortgage was always junior to the Irwin Mortgage and “no harm would come to Gibson’s lien position by the Neus (and their lender, Washington Mutual) attaining first lien status.”³¹⁷ The court of appeals examined the Indiana Supreme Court’s recent decision in *Bank of New York v. Nally* and

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 191-92.

312. *Id.* at 192.

313. *Id.* at 193 (quoting Appellant’s Brief at 18-19, *Gibson*, 867 N.E.2d 188 (No. 49A02-0608-CV-680)).

314. *Id.* at 194.

315. *Id.* at 195.

316. *Id.*

317. *Id.* at 193.

its application of the doctrine of equitable subrogation.³¹⁸ Following this comprehensive discussion of *Bank of New York*, the court concluded that the trial court did not err by granting the Neus and Washington Mutual equitable subrogation to the extent of the Irwin mortgage.³¹⁹

G. Accord and Satisfaction

In *Wolfe v. Eagle Ridge Holding Co.*,³²⁰ the court of appeals discussed the rule of accord and satisfaction in connection with a construction contract.³²¹

Eagle Ridge Holding Company ("Eagle Ridge") contracted with Wolfe Construction in June 2004 to construct a building.³²² In October, "after completion of the work, Wolfe sent Eagle Ridge a final invoice for \$27,031.75."³²³ Shortly thereafter, "Eagle Ridge sent Wolfe a check for \$12,000 as partial payment," leaving a balance of \$15,031.75.³²⁴ A month later, Eagle Ridge sent a check, numbered 1031, to Wolfe in the amount of \$10,461.94.³²⁵ "Written on both the front and back of the check were the words, 'Full & Final Payment.'"³²⁶ The check was accompanied by a document that listed portions of the invoice that Eagle Ridge believed to be inaccurate and purported to reduce the total invoice by \$4569.81.³²⁷

Instead of cashing check 1031, Wolfe filed a notice of intention to hold a mechanic's lien.³²⁸ Six months later, in June 2005, Wolfe attempted to cash the check after endorsing it, "Deposited without prejudice & with full reservation of all rights to balance per [Indiana Code section] 26-1-1-207. It is not an accord or [sic] satisfaction"³²⁹ Eagle Ridge's bank refused to cash check 1031 "because it was more than six months old."³³⁰ A week later, Eagle Ridge sent Wolfe check number 1071, also in the amount of \$10,461.94, with a note that it was intended to replace check 1031.³³¹ Check 1071 was also marked "Full & Final Payment."³³² Wolfe cashed check 1071 without the language that it had written on check 1031 regarding a reservation of rights.³³³

318. *Id.* at 197-99 (citing *Bank of N.Y. v. Nally*, 820 N.E.2d 644 (Ind. 2005)).

319. *Id.* at 202.

320. 869 N.E.2d 521 (Ind. Ct. App. 2007).

321. *Id.* at 523.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

In September 2005, Eagle Ridge attempted to secure financing on its property and demanded that Wolfe release the mechanic's lien.³³⁴ Wolfe entered into agreement with the title company whereby an escrow was established so that Eagle Ridge could close on the loan without a release of the lien.³³⁵ Wolfe then filed a complaint to foreclose the lien.³³⁶ Eagle Ridge "filed a counterclaim, alleging that it suffered damages because of Wolfe's refusal to release the lien and because of Wolfe's poor workmanship."³³⁷ "The trial court entered judgment of \$13,917.14 in favor of Eagle Ridge, and against Wolfe on his foreclosure complaint."³³⁸ This damages award "included \$1,415.00 on Eagle Ridge's poor workmanship claim and \$12,502.14 for Wolfe's refusal to release the mechanic's lien."³³⁹ The trial court refused to award Eagle Ridge attorney's fees based on a frivolous lawsuit. Wolfe appealed, and Eagle Ridge cross-appealed.³⁴⁰

On the issue of accord and satisfaction, the court held that Wolfe's act in cashing check 1071 operated as an accord and satisfaction because: (1) the check "was conspicuously marked on the front and back as being for full and final payment"; (2) the check "was accompanied by other correspondence indicating that the check was intended as full and final payment"; (3) the check was "tendered in good faith"; and (4) "[t]here was a bona fide dispute over the amount that Eagle Ridge owed."³⁴¹

With respect to the calculation of damages, the court held that the language of Indiana Code section 32-28-6-1 is clear and that it "requires that a demand for release of a mechanic's lien must be made before damages . . . may begin to accrue to the lienholder for refusal to release the lien."³⁴²

VII. TAKINGS

A. Biddle v. BAA Indianapolis, LLC³⁴³

Homeowners who live in Hawthorne Ridge subdivision, located within three miles of Indianapolis International Airport ("Airport"), claimed that noise from airplanes amounted to a taking under the Fifth Amendment.³⁴⁴ The homeowners also argued that the Airport should have been compelled to offer them financial settlements similar to those offered to their neighbors who had earlier sued the

334. *Id.*

335. *Id.* at 524.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* (footnote omitted).

340. *Id.*

341. *Id.* at 527-28.

342. *Id.* at 528.

343. 860 N.E.2d 570 (Ind. 2007).

344. *Id.* at 572-73.

Airport.³⁴⁵

In 1999, some residents of Hawthorne Ridge, not including the present plaintiffs, filed suit against the Airport.³⁴⁶ At settlement, those plaintiffs received a \$16,000 payment each in exchange for an easement in favor of the Airport.³⁴⁷ The settlement also included certain price guarantees at the time those homeowners sold their homes.³⁴⁸ In *Biddle*, the trial court granted summary judgment to the Airport, finding that the plaintiffs “did not suffer a special injury and that the flights were too high to constitute a taking” and “that the flights did not cause practical destruction of the [plaintiffs’] properties.”³⁴⁹ Regarding the earlier settlement, the trial court found that the plaintiffs could not rely upon a theory of promissory estoppel that the Airport had agreed to “treat all neighbors alike” because they had not attended the meeting in which the promise had allegedly been made.³⁵⁰ The court of appeals reversed and remanded for trial.³⁵¹ The Indiana Supreme Court granted transfer.³⁵²

Chief Justice Shepard, writing for the court, spent several pages describing the origins of the Fifth Amendment and the rationale behind the line of cases interpreting it.³⁵³ With respect to claims of takings due to airport noise, he noted that while at least one state decision held that airport noise can constitute a taking, the “‘great weight of Federal authority’ is that a taking occurs only when aircraft are present in the ‘superadjacent airspace’ (meaning the air the owner reasonably occupies for his own use).”³⁵⁴ The court cited the 1963 Court of Federal Claims case of *Aaron v. United States*³⁵⁵ for the proposition that when an aircraft flies within the navigable airspace above private property, “the court presumes there is no taking unless the effect on private property is ‘so severe as to amount to a practical destruction or a substantial impairment of it.’”³⁵⁶ In this case, the court concluded that the trial court was “warranted” that the noise from the aircraft over the plaintiffs’ homes was “no doubt considerable,” but did not defeat the *Aaron* presumption.³⁵⁷

The plaintiffs also claimed that the Airport was estopped from declining to offer the terms of the previous settlement to all of the homeowners in Hawthorne Ridge, even those who were not litigants in that action.³⁵⁸ The plaintiffs relied

345. *Id.* at 573.

346. *Id.* at 574.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 575-80.

354. *Id.* at 578 (quoting *Branning v. United States*, 654 F.2d 88, 99 (Ct. Cl. 1981)).

355. 311 F.2d 798 (Ct. Cl. 1963).

356. *Biddle*, 860 N.E.2d at 579 (quoting *Aaron*, 311 F.2d at 801).

357. *Id.* at 580.

358. *Id.*

upon statements made by Airport representatives at a neighborhood meeting prior to the commencement of the first lawsuit, in which the Airport promised to treat all Hawthorne Ridge residents “uniformly and equally.”³⁵⁹ The plaintiffs alleged that they did not join the previous lawsuit in reliance on that promise.³⁶⁰ The plaintiffs claimed to be third-party beneficiaries of the alleged promises, even though they did not attend the meetings.³⁶¹ The Airport argued that the plaintiffs’ lack of attendance at the meetings prevented them from receiving the promise, and therefore the promissory estoppel claim must fail.³⁶² The court agreed with the Airport, finding that the plaintiffs failed to demonstrate any evidence that a promise was made.³⁶³ “The public statements made by [the Airport] officials are more akin to a statement of policy than a promise. Even assuming *arguendo* that the statements were promises, it is clear they referred to the operation of [the Airport’s] land use programs, not to settlement of future litigation.”³⁶⁴ Finally, the court agreed with the trial court that the plaintiffs failed to establish detrimental reliance.³⁶⁵

*B. Jensen v. City of New Albany*³⁶⁶

Fawcett executed a warranty deed to the City of New Albany in 1935, conveying 5.82 acres to the City “so long as said real estate shall be used as a Municipal Park and Golf course and with the provision that no picnic parties are to be allowed on said real estate.”³⁶⁷ The deed contained a reversionary clause to Fawcett’s heirs.³⁶⁸ The property was used for park purposes, except for a small portion that was conveyed to the state in lieu of condemnation for the expansion of I-64, until 2004.³⁶⁹ The City conveyed the land to the Community Housing Development Organization, Inc. to serve as a place to relocate homes to be moved due to the expansion of Floyd Memorial Hospital.³⁷⁰ Fawcett’s heirs filed for declaratory judgment and an injunction to enforce the reversionary clause of the 1935 deed.³⁷¹

The court of appeals agreed with the trial court that the case of *Dible v. City*

359. *Id.* at 580 & n.20.

360. *Id.*

361. *Id.*

362. *Id.* at 580-81.

363. *Id.* at 581.

364. *Id.*

365. *Id.*

366. 868 N.E.2d 525 (Ind. Ct. App. 2007).

367. *Id.* at 526 (quoting Brief of the Appellant at 3, *Jensen*, 868 N.E.2d 525 (No. 22A01-0605-CV-187)).

368. *Id.*

369. *Id.* at 527.

370. *Id.*

371. *Id.* at 527-28.

of *Lafayette*³⁷² is applicable and dispositive.³⁷³ In particular, both courts noted that while *Dible* stands for the proposition that a restrictive covenant is not enforceable against an entity with the power of eminent domain, the reasoning of the case is consistent with extending that holding to apply to reversionary clauses as well.³⁷⁴

C. *Utility Center, Inc. v. City of Fort Wayne*³⁷⁵

The City of Fort Wayne (“City”) owns a sewer and water utility.³⁷⁶ Utility Center, Inc. is a privately owned, for-profit corporation providing identical services in an area around Fort Wayne.³⁷⁷ Following Fort Wayne’s annexation of certain land served by Utility Center, the City initiated an action pursuant to Indiana’s general eminent domain statute to condemn that portion of Utility Center’s system which serves the annexed area.³⁷⁸ “Utility Center filed a complaint seeking declaratory and injunctive relief from the condemnation, on the grounds that the City was not following the proper condemnation procedure.”³⁷⁹ The City filed its own declaratory relief claim, arguing that Utility Center was compelled by law to consent to the sale of its system.³⁸⁰ “The parties filed cross-motions for summary judgment.”³⁸¹ The trial court granted the City’s motion and denied that of Utility Center.³⁸² The Indiana Court of Appeals reversed and remanded.³⁸³ The Indiana Supreme Court granted the City’s petition to transfer.

Justice Sullivan, writing for the majority, expressed the essence of the case: “Stated simply, the question before the Court is whether this sixth section of chapter 30 ([Indiana Code section] 8-1-30-6) abrogates or restricts the City’s authority to condemn Utility Center’s property pursuant to sections 92 and 93 of chapter 2 ([Indiana Code sections] 8-1-2-92 & 93).”³⁸⁴ The sixth section reads as follows:

A municipality or other governmental unit may not require a utility company that provides water or sewer service to sell property used in the provision of such service to the municipality or governmental unit under [Indiana Code section] 8-1-2-92, [Indiana Code section] 8-1-2-93, or

372. 713 N.E.2d 269 (Ind. 1999).

373. *Jensen*, 868 N.E.2d at 529.

374. *Id.* at 529-30.

375. 868 N.E.2d 453 (Ind. 2007).

376. *Id.* at 454.

377. *Id.*

378. *Id.* at 455.

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 457.

otherwise, unless the procedures and requirements of this chapter have been complied with and satisfied.³⁸⁵

The court of appeals, in its vacated opinion, held that “[t]he Legislature could have limited the circumstances to which section 6 applies . . . , but did not.”³⁸⁶ The supreme court, however, held that “section 6 must be read in the context of the rest of chapter 30” and therefore “applies only to a utility company that has been the subject of the remedial measures identified in the preceding sections of chapter 30.”³⁸⁷

The court wrote that Senator David Long, the author of chapter 30 when it was enacted in 1999, filed an affidavit with the trial court explaining his “intent as the author” of the statute.³⁸⁸ The trial court and the court of appeals did not consider the affidavit.³⁸⁹ The supreme court, however, noted that Senator Long’s affidavit stated that “his intent, as the author, was to prevent ‘a municipal utility from using its powers of eminent domain to take over the ownership of a healthy private utility.’”³⁹⁰ Justice Sullivan wrote that “[w]e respect Senator Long’s work in this field but, for the reasons set forth above, are unable to conclude that his intent in this regard was enacted into law.”³⁹¹

Justice Boehm filed a dissenting opinion in which Justice Dickson concurred.³⁹² Justice Boehm parsed the language of section 6 in the context of sections 1 through 5 of chapter 30 and suggested that

the majority reads that section in a manner that strips it of any meaning whatever. Section 6 prohibits condemnation of a utility without going through the ‘procedures and requirements’ of Section 5. The majority concludes that Section 6 applies only to utilities that are the subject of a Section 5 order. But those are the very utilities that have gone through the only ‘procedures and requirements’ of Chapter 30. It therefore seems to me that the majority’s reading renders Section 6 wholly empty of content.³⁹³

VIII. MISCELLANEOUS: *RUSSO V. SOUTHERN DEVELOPERS, INC.*³⁹⁴

Southern Developers, Inc. created a residential subdivision in Floyd County,

385. IND. CODE § 8-1-30-6 (2004).

386. *Utility Ctr., Inc.*, 868 N.E.2d at 457.

387. *Id.*

388. *Id.* at 459.

389. *Id.*

390. *Id.* (quoting Brief of Indiana Ass’n of Sewer Cos., Indiana-American Water Co., American Subu at 13, *Utility Ctr., Inc.*, 868 N.E.2d 453 (No. 02A04-0410-CV-576)).

391. *Id.*

392. *Id.* at 461 (Boehm, J., dissenting).

393. *Id.* at 463.

394. 868 N.E.2d 46 (Ind. Ct. App. 2007).

Indiana, and in 1995 built a single-family residence in the subdivision.³⁹⁵ That home was sold to the Conlees in 1996.³⁹⁶ The following year the surface water drainage system of the subdivision failed, and the Conlees' home suffered flood damage.³⁹⁷ The developer attempted to repair the system, but the following year it failed again, and the Conlees notified the developer of the problem.³⁹⁸ In 2001, the Conlees sold the home to the Russos without informing them of the prior flooding problems.³⁹⁹ The Russos suffered flood damage in both 2003 and 2004 and notified the developers of the issue and demanded repairs in January 2005.⁴⁰⁰ The system was not repaired.⁴⁰¹ The Russos then filed suit against the developers and the Conlees, among others.⁴⁰² The developers defended on the grounds that the statute of limitations on the Russos' breach of the implied warranty of habitability claim had run.⁴⁰³ The trial court agreed, and the Russos appealed. The trial court was affirmed.⁴⁰⁴

The court held that the knowledge of the prior owner of the home is imputed to subsequent owners for purposes of determining when the statute of limitations begins to run with respect to a claim for a breach of the implied warranty of habitability.⁴⁰⁵ As such, the six-year statute did not begin to run in 2003 when the Russos first suffered flood damage, but in 1997 when the Conlees first suffered the damage.⁴⁰⁶ The holding in this case represents a matter of first impression for the Indiana courts.

IX. NEW STATUTES EFFECTIVE JULY 1, 2007

Indiana Code section 32-21-4-1 was amended to provide that if a mortgage is recorded but fails to comply with the requirements of Indiana Code section 32-21-2-3 or Indiana Code section 32-21-2-7 or the technical requirements of Indiana Code section 36-2-11-16(c), the mortgage will still be deemed to be validly recorded and to provide constructive notice as of the date of filing.⁴⁰⁷

Indiana Code section 32-31-5-6 was amended by House Enrolled Act 1214⁴⁰⁸ to provide that a residential tenant "may not unreasonably withhold consent" for a landlord to enter upon the tenant's dwelling to inspect; repair; improve;

395. *Id.* at 47.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.* at 49.

406. *Id.*

407. IND. CODE § 32-21-4-1(c) (Supp. 2007).

408. Rental Property—Storage, 2007 Ind. Legis. Serv. 115 (West).

decorate; supply services; or exhibit to buyers, mortgagees, tenants, workers, or contractors.⁴⁰⁹ Indiana Code section 32-31-42 states that a landlord has no liability for the loss or damage to a tenant's personal property if the property has been abandoned.⁴¹⁰ Property is considered abandoned if a reasonable person would conclude that the tenant had vacated the premises and surrendered possession of the personal property.⁴¹¹ An oral or written rental agreement may not define abandonment differently.⁴¹² The Act also provides that, under certain circumstances, a landlord may remove a tenant's personal property and deliver it to a storage facility approved by the court.⁴¹³ This section of the code applies only to "dwelling units" and not to commercial tenants.

Indiana Code section 32-31-9 was created as a new chapter of the Indiana Code by House Enrolled Act 1509⁴¹⁴ entitled "Rights of Tenants Who Are Victims of Certain Crimes." The new chapter provides lease protections for victims of domestic violence and prohibits a landlord from "terminat[ing] a lease, refus[ing] to renew a lease, refus[ing] to enter into a lease, or retaliat[ing] against a tenant solely because: a tenant; an applicant; or a member of the tenant's or applicant's household" is a victim or alleged victim of a sex offense, stalking, or a crime involving domestic violence and has received a restraining order or a criminal no contact order.⁴¹⁵ A tenant who is a victim or an alleged victim of a crime involving domestic or family violence, a sex offense, or stalking may, at tenant's expense, have the locks of the tenant's dwelling unit changed within twenty-four hours of providing the landlord with a copy of a restraining order if the perpetrator is a tenant in the same dwelling unit⁴¹⁶ (within forty-eight hours if the perpetrator is not a tenant in the same dwelling unit).⁴¹⁷ The Act also provides that such a tenant is entitled to terminate the tenant's rights and obligations under the rental agreement if an accredited domestic violence or sexual assault program recommends relocation as a part of its safety plan for the tenant.⁴¹⁸ A landlord is immune from civil liability for excluding the perpetrator from the dwelling unit under court order and for the loss of, use of, or damage to personal property while the personal property is present in the dwelling unit.⁴¹⁹

Indiana Code section 32-28-14 is a new chapter entitled "Homeowners Association Liens" and was created by Senate Enrolled Act 232.⁴²⁰ It creates a

409. IND. CODE § 32-31-5-6(e) (Supp. 2007).

410. *Id.* § 32-31-4-2(a).

411. *Id.* § 32-31-4-2(b).

412. *Id.* § 32-31-4-2(c).

413. *Id.* § 32-31-4-2(e).

414. Crime Victims—Landlord and Tenant, 2007 Ind. Legis. Serv. 22 (West).

415. IND. CODE § 32-31-9-8(a) (Supp. 2007).

416. *Id.* § 32-31-9-10.

417. *Id.* § 32-31-9-9(b).

418. *Id.* § 32-31-9-12.

419. *Id.* § 32-31-9-10(d).

420. Real Estate—Conveyances—Records and Recordation, 2007 Ind. Legis. Serv. 135 (West).

new type of lien that can be levied against the real property of a homeowner who fails to pay for certain common expenses.⁴²¹ The process for enforcing the lien is set forth in the new chapter.⁴²²

Indiana Code section 32-21-2-3 was amended to provide that “a conveyance may not be recorded after June 30, 2007, unless” the conveyance includes “the street address or rural route address of the grantee.”⁴²³

Indiana Code section 32-21-12 applies to restrictive covenants recorded after June 30, 2007, and states that “[e]xcept as provided in section 4 of this chapter, a deed restriction or restrictive covenant may not prohibit or restrict the erection of an industrialized residential structure on real property.”⁴²⁴ Section 4 states that “[a] deed restriction, restrictive covenant, or agreement that applies uniformly to all homes and industrialized residential structures in a subdivision may impose the same aesthetic compatibility requirements on an industrialized residential structure in the subdivision that are applicable to all residential structures in the subdivision.”⁴²⁵

X. OTHER CASES

The following cases concern property issues, but were not particularly noteworthy or simply applied accepted common law or statutory tests. Nonetheless, they are listed here as a guide to practitioners who may be interested in a particular area of property law.⁴²⁶

421. IND. CODE § 32-28-14-5(a) (Supp. 2007).

422. *Id.* § 32-28-14-8.

423. *Id.* § 32-21-2-3(b).

424. *Id.* § 32-21-12-3(a).

425. *Id.* § 32-21-12-4.

426. *Cook v. Adams County Plan Comm’n*, 871 N.E.2d 1003, 1004, 1009 (Ind. Ct. App.) (holding that “one-year lease for real estate which contained provisions for annual automatic renewal” did not constitute a “long term lease” under applicable zoning ordinance for intensive livestock operations), *trans. denied*, 878 N.E.2d 220 (Ind. 2007); *Green Tree Servicing, LLC v. Random Antics, LLC*, 869 N.E.2d 464, 468-70 (Ind. Ct. App. 2007) (holding that a mobile home was personal property and should not have been included in the fee interest that passed through a tax deed on the underlying real property); *Green Tree Servicing, LLC v. Auditor & Treasurer of Howard County*, 868 N.E.2d 1, 3-4 (Ind. Ct. App. 2007) (holding that “statute designating claimants of tax sale surplus funds did not unconstitutionally deprive mortgagee of property without due process by failing to designate mortgagee as a claimant”); *State v. Universal Outdoor, Inc.*, 864 N.E.2d 403, 407 (Ind. Ct. App. 2007) (holding that “[t]o harmonize subsections (a) and (c)” of Indiana Code section 32-24-1-11 in the unique facts of this case, “exceptions are timely if filed within twenty days of the filing of the appraisers’ report but no later than twenty days after the clerk sends notice of the appraisers’ report to the parties”), *opinion vacated*, 880 N.E.2d 1188 (Ind. 2008); *Gilpin v. Ivy Tech State College*, 864 N.E.2d 399, 402-03 (Ind. Ct. App. 2007) (holding that Gilpin, the father of an adult child attending Ivy Tech, was a licensee rather than a public invitee when he entered the building to use the restroom because “no reasonable person could conclude Ivy Tech extended an invitation to Gilpin to use its public restrooms under these circumstances”

and also holding that Gilpin was aware of the loose gravel upon which he slipped, so the gravel cannot be considered to be a latent danger about which Ivy Tech had a duty to warn); *Hodges v. Swafford*, 863 N.E.2d 881, 887-91 (Ind. Ct. App.) (holding, as a matter of first impression, that finance charges paid by a borrower over the entire life of a loan amounted to points and fees “payable” by borrower at or before closing, such that the land contract was a high cost loan subject to the Federal Home Ownership and Equity Protection Act), *amended on reh’g by* 868 N.E.2d 1179 (Ind. Ct. App. 2007); *Huntington v. Riggs*, 862 N.E.2d 1263, 1270 (Ind. Ct. App.) (holding that a property owner acquired title to a disputed strip of land through “acquiescence”), *trans. denied*, 869 N.E.2d 462 (Ind. 2007); *House v. First Am. Title Co.*, 858 N.E.2d 640, 644-45 (Ind. Ct. App. 2006) (holding that an injunction against the previous owner preventing use of a common septic system was not a “title defect” that would permit House to make a claim under his title insurance policy); *Wetherald v. Jackson*, 855 N.E.2d 624, 638-43 (Ind. Ct. App. 2006) (upholding trial court ruling that Jackson had acquired certain waterfront property by adverse possession), *trans. denied*, 869 N.E.2d 456 (Ind. 2007); *Prairie Material Sales, Inc. v. Lake County Council*, 855 N.E.2d 372, 374, 367-77 (Ind. Ct. App. 2006) (holding that a local ordinance that limited the weight of trucks on certain roads and bridges did not violate Indiana Code section 36-7-4-1103(c) which prohibits any action outside urban areas that prevents “the complete use and alienation of any mineral resources or forests by the owner or alienee of them”), *trans. denied*, 869 N.E.2d 458 (Ind. 2007); *St. Charles Tower, Inc. v. Bd. of Zoning Appeals*, 855 N.E.2d 286, 293-94 (Ind. Ct. App. 2006) (reversing trial court’s denial of Appellant-Plaintiff’s petition to reverse the Board of Zoning Appeals’s denial of a special use permit for the construction of a cellular tower), *vacated*, 873 N.E.2d 598 (Ind. 2007).

RECENT DEVELOPMENTS IN INDIANA TAXATION

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INTRODUCTION—SOME ABBREVIATION REFERENCES

This Article highlights the major tax developments that occurred through the calendar year of 2007.¹ Whenever the term “GA” is used in this Article, such term refers only to the 115th Indiana General Assembly. Whenever the term “Governor” is used in this Article, such term refers only to the Governor of Indiana who was serving in office during the 115th Indiana General Assembly. Whenever the term “Tax Court” is referred to in this Article, such term refers only to the Indiana Tax Court. Whenever the term “DLGF” is used in this Article, such term refers only to the Indiana Department of Local Government Finance. Whenever the term “BTR” is used in this Article, such term refers only to the Indiana Board of Tax Review. Whenever the term “SBTC” is used in this Article, such term refers only to the Indiana State Board of Tax Commissioners. Whenever the term “DOSR” is used in this Article, such term refers only to the Indiana State Department of Revenue. Whenever the term “I.C.” is used in the text of this Article, such term refers only to the Indiana Code which is in effect at time of the publication of this Article. Whenever the term “ERA” is used in this Article, such term refers only to an Indiana Economic Revitalization Area. Whenever the term “CAGIT” is used in this Article, such term refers only to the Indiana County Adjusted Gross Income Tax. Whenever the term “COIT” is used in this Article, such term refers only to the Indiana County Option Income Tax. Whenever the term “EDC” is used in this Article, such term refers only to the Indiana Economic Development Corporation. Whenever the term “CDC” is used in this Article, such term refers only to the Indiana Community Development Corporation. Whenever the term “CEDIT” is used in this Article, such term refers only to the Indiana County Economic Development Income Taxes. Whenever the term “EDIT” is used in this Article, such term refers only to the Indiana Economic Development Income Tax. Whenever the term “BMV” is used in this Article, such term refers only to the Indiana Bureau of Motor Vehicles. Whenever the term “IRC” is used in this Article, such term refers only to the

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1. For comprehensive information concerning the Indiana Tax Court, the Indiana Department of State Revenue, the Indiana Board of Tax Review, the Indiana Department of Local Government Finance, and a variety of other tax-related information, visit Professor Jeggen’s Taxsite at <http://www.iupui.edu/~taxsite> and the State of Indiana’s official website at <http://www.state.in.us>.

Internal Revenue Code which is in effect at the time of the publication of this Article. Whenever the term "AOPA" is used in this Article, such term refers only to the Indiana Administrative Orders and Procedures Act. Whenever the term "CBTCPR" is used in this Article, such term refers only to the County Board of Tax and Capital Projects. Whenever the term "PTABOA" is used in this Article, such term refers only to a Property Tax Assessment Board of Appeals.

I. INDIANA GENERAL ASSEMBLY LEGISLATION

The 115th GA passed several pieces of legislation affecting various areas of state and local taxation, e.g., state income taxes, county property taxes, sales and use taxes, and local taxes. The most significant changes occurred in the area of property tax appeal procedures. However, most of the amendments to the property tax laws are very technical ones, and it takes a fairly knowledgeable individual about property taxes to fully understand these amendments.

A. *Property Tax*²

The GA enacted a variety of changes to property tax legislation. For 2007 taxes payable in 2008, the GA amended the statute to keep the standard deduction for the homestead credit at \$45,000, the same amount allowable for the previous tax year.³ The GA also amended the provision that would reduce the standard deduction to \$35,000 starting in the 2007 assessment year to a gradually declining schedule beginning in the 2008 assessment year for taxes payable in 2009 and future years.⁴ The standard deduction is to gradually be reduced annually by \$1000 until 2012 when the deduction levels off at \$40,000.⁵

Counties continue to have the option to authorize a "circuit breaker" that limits residential property taxes. The GA amended the "circuit breaker" provision to provide that for 2008 and 2009, the credit for taxes greater than 2% applies to "homestead property" instead of "qualified residential property."⁶ Further, after 2009, the circuit breaker credit for taxes greater than 2% applies to homestead property while a circuit breaker credit for taxes greater than 3% applies to property other than homestead property.⁷ The GA also removed tuition support levies from the circuit breaker calculations,⁸ removed the ability of the Property Tax Replacement Fund Board to raise the percentage of the homestead

2. For an additional list of the property tax provisions enacted by the GA in 2007, see Memorandum from Ind. Dep't of Local Gov't Fin. to Political Subdivisions, County Auditors, Assessors, and Treasurers, and Twp. and Tr. Assessors (June 2007), available at <http://www.in.gov/dlgf/memos/pdfs/memos/LegislationMemoJune2007.pdf>.

3. IND. CODE § 6-1.1-12-37 (Supp. 2007) (as amended by 2007 Ind. Acts 3870-71).

4. *Id.*

5. *Id.*

6. *Id.* § 6-1.1-20.6-6.5 (as amended by 2007 Ind. Acts 3918-19).

7. *Id.* § 6-1.1-20.6-7 (as amended by 2007 Ind. Acts 3919-21).

8. *Id.*

credit,⁹ and amended I.C. § 6-1.1-21.2-15 to prohibit the inclusion of a tax increment replacement tax in the calculation of the circuit breaker credit.¹⁰

After December 31, 2008, the County Board of Tax Adjustment is to be abolished.¹¹ Beginning January 1, 2009, a CBTCPR is to be established in each county.¹² Each CBTCPR is to consist of nine members, all of whom are to be voting members.¹³ The county auditor will make any necessary tie-breaking vote.¹⁴ Depending on the number of municipalities and school corporations within a county, there are to be four alternative membership formulations for the CBTCPR.¹⁵ However, all appointed members must be elected officials serving on the fiscal body of a taxing unit or group of taxing units except for two county residents that are to be separately elected to the CBTCPR by the voters.¹⁶ A petitioning political subdivision is required to submit a proposed financial plan to the CBTCPR.¹⁷ The CBTCPR

may: (1) increase the threshold at which the circuit breaker credit applies to a person's property tax liability; or (2) provide for a uniform percentage reduction to circuit breaker credits otherwise provided in the county; if the governing boards of all political subdivisions in the county agree to that plan.¹⁸

The GA also amended I.C. § 6-1.1-10-16(d) to extend the period of time when property tax exemptions apply to vacant land which is intended to be developed in order to erect exempt structures.¹⁹ The provision was also amended to provide for a property tax recapture if certain exempt property is sold within four years of its purchase.²⁰

As stated above, the majority of changes to property tax legislation occurred in the area of property tax appeal procedures.²¹ The GA made significant changes to the procedures at both the local and state levels.

The GA made the following changes to local procedure. The changes affect review notices filed after June 30, 2007, and later proceedings connected with

9. *Id.* § 6-1.1-20.9-2 (as amended by 2007 Ind. Acts 3921-23).

10. 2007 Ind. Acts 3923-24.

11. IND. CODE § 6-1.1-29-1 (Supp. 2007) (as amended by 2007 Ind. Acts 3924).

12. *Id.* § 6-1.1-29-1.5 (as added by 2007 Ind. Acts 3924-27).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. TERESA LUBBERS, 2007 SUMMARY OF NEW LAWS: FIRST REGULAR SESSION OF THE 115TH INDIANA GENERAL ASSEMBLY 2007, at 114, *available at* http://www.in.gov/legislative/senate_republicans/homepages/newlaws/2007/Lubbers.pdf (citing IND. CODE § 6-1.1-29.5 (Supp. 2007) (as added by 2007 Ind. Acts 3933-39)).

18. *Id.*

19. 2007 Ind. Acts 2825-29.

20. *Id.*

21. A majority of the information provided for this section was provided by the BTR.

those notices.²² First, taxpayers are no longer required to request a preliminary conference with the local official (usually the township assessor) to initiate a property tax appeal.²³ Taxpayers are now only required to file written notice with the official who made the assessment being challenged.²⁴

The GA also clarified and provided uniformity to portions of I.C. § 6-1.1-15-1 regarding the filing deadlines that determine the effective date of an appeal.²⁵ The deadlines are separated into two broad categories: appeals where a notice of assessment or change of assessment was issued and appeals without such notice.²⁶ When such notice has been issued, the taxpayer can appeal the assessment for the date specified in the assessment notice by filing a written request for review within forty-five days after the notice was given.²⁷ If no notice was issued, then the filing deadline differs based upon the assessment date challenged. If the assessment date is before 2009, then the taxpayer must file a request for review on or before May 10.²⁸ If the assessment date is after 2008, then the taxpayer must file a request either before May 10 or forty-five days after the date the county auditor mails the statement as required by I.C. § 6-1.1-17-3(b), whichever is later.²⁹

The deadlines for county boards to act upon taxpayers' written requests for review under I.C. § 6-1.1-15-1 also changed. County boards now have 180 days to conduct a hearing and 120 days to issue a determination.³⁰ The deadlines are no longer based upon the county's population or the year of appeal. Taxpayers were also given recourse if a county board fails to act within the designated deadlines. Taxpayers can now appeal to the BTR without any action by the county board if the county board does not meet its deadline for holding a hearing or issuing a determination.³¹

The following changes were made to the property tax appeal procedures at the state level under I.C. § 6.1.1-15-3. Most of these changes only apply to petitions to the BTR based on county board determinations issued after June 30, 2007, and later proceedings connected with those petitions.³² First, taxpayers seeking review of a county board determination must now file the request directly with the BTR instead of the county assessor.³³ Previously, taxpayers were

22. IND. CODE § 6-1.1-15-1 (Supp. 2007) (as amended by 2007 Ind. Acts 3779-80).

23. *Id.* (as amended by 2007 Ind. Acts 3611-17). Taxpayers are not precluded, however, from continuing to request this hearing. *Id.* Once a hearing is requested by a taxpayer, the official is required to meet with the taxpayer. *Id.*

24. *Id.*

25. *See* 2007 Ind. Acts 3611-17.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 3779-80.

33. *Id.* at 3617-19.

required to file such requests with the county assessor who forwarded the request to the BTR. Further, the person who files the petition, and not the county assessor, must now serve the opposing party with a copy of the petition, which is similar to court proceedings.³⁴

Taxpayers also have more time for filing a review petition. The GA amended the deadline from thirty days to forty-five days to make the requirement more uniform with other appeal statutes.³⁵ The GA also changed the requirements for the named government party in BTR proceedings. An amendment to I.C. § 6-1.15-3 now provides that the county assessor is the party responsible for defending the county board's determination, regardless of who made the original assessment.³⁶ Additionally, if the county assessor dissented from the county board's determination, then the county assessor also may petition the BTR for review of the decision.³⁷

The GA also clarified what evidence the BTR may use to base its decisions as well as the required content of BTR written decisions. First, the BTR must base its final determinations in appeals from DLGF decisions on the preponderance of the evidence.³⁸ Moreover, the BTR's written determinations regarding those appeals must include findings of fact and be based exclusively on "the evidence on the record in the proceedings," and "matters officially noticed in the proceeding."³⁹

The GA also made changes to the procedures for obtaining judicial review of BTR final determinations. The changes discussed only affect petitions based on BTR determinations issued after June 30, 2007, and later proceedings connected with those petitions.⁴⁰ Most importantly, taxpayers are no longer required to comply with AOPA in filing a Tax Court petition and filing the administrative record with the Tax Court.⁴¹ Instead, the revised provision provides that taxpayers must file a petition with the Tax Court; serve a copy of the petition to the county assessor, attorney general, and any entities that have filed amicus curiae briefs with the BTR; and notify the BTR in writing of the intent to seek judicial review.⁴² Similar to the change made at the BTR review level, the GA also changed the named party in a petition for judicial review to the county assessor instead of the assessing official that made the original assessment determination.⁴³ Lastly, changes were also made to the deadlines for initiating judicial review. Taxpayers now have forty-five days to appeal BTR

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. IND. CODE § 6-1.1-15-4 (Supp. 2007) (as amended by 2007 Ind. Acts 3619-23).

39. *Id.* § 6-1.5-5-4 (as amended by 2007 Ind. Acts 3685-86).

40. *Id.* § 6-1.1-15-5 (as amended by 2007 Ind. Acts 3779-80).

41. *See id.* § 6-1.1-15-5 (as amended by 2007 Ind. Acts 3623-25).

42. *Id.*

43. *Id.*

determinations, whether or not the determinations were issued on a rehearing.⁴⁴

B. Utility Receipts Tax

The GA passed legislation clarifying and expanding portions of the utility receipts tax. First, the GA expanded the definitions of an “affiliated group” and a “controlled group” under I.C. §§ 6-2.3-1-2 and 6-2.3-1-2.5, respectively, to be consistent with the IRC definitions of these terms.⁴⁵ The GA then added I.C. § 6-2.3-4-6, which provides that gross receipts from the sale of utility services between members of a controlled group of corporations are exempt from the utility receipts tax if the seller is the producer of the utility service, and the purchaser is the end user, and the seller and user exist in the same or adjacent locations.⁴⁶

The GA clarified I.C. § 6-2.3-5-3 when it amended it to provide that the resource recovery tax deduction allowed for the utility receipts tax shall be disallowed if the taxpayer is convicted of a *criminal* violation under I.C. § 13 (environmental law).⁴⁷

Finally, the GA amended I.C. § 6-2.3-6-1 to increase the threshold for the annual unpaid utility receipts tax liability from \$1000 to \$2500 before quarterly estimated payments are required to be made and reduce the threshold for electronic funds transfer (“EFT”) payments from \$10,000 to \$5000 for taxable years beginning after December 15, 2007.⁴⁸

C. Sales and Use Tax

Indiana is a full member of the Streamlined Sales and Use Tax (“SST”) Agreement. Thus, some of the changes made to Indiana sales tax law were made to make the law consistent with the SST Agreement.

1. *Telecommunications Services*.—One area that received attention this year was telecommunications services. Several definitions were added to provide clarification in this area. First, effective January 1, 2008, the term “telecommunications services” is defined as the “electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points.”⁴⁹ “The term includes a transmission . . . in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission . . . whether the service: (1) is referred to as voice over internet protocol services; or (2) is classified by the [FCC] as enhanced or value added.”⁵⁰ However, the term does not include:

44. *Id.*

45. 2007 Ind. Acts 978.

46. *Id.*

47. 2007 Ind. Acts 1936-37.

48. 2007 Ind. Acts 3025-27.

49. IND. CODE § 6-2.5-1-27.5 (Supp. 2007) (as added by 2007 Ind. Acts 2179-80).

50. *Id.*

(1) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser . . . [;] (2) Installation or maintenance of wiring or equipment on a customer's premises[;] (3) Tangible personal property[;] (4) Advertising, including but not limited to directory advertising[;] Billing and collection services provided to third parties[;] (6) Internet access service[;] (7) Radio and television audio and video programming services, regardless of the medium . . . [,] includ[ing] cable service . . . and audio and video programming services delivered by commercial mobile radio service providers . . . [;] (8) Ancillary services[; or] (9) Digital products delivered electronically including . . . [A] Software, [B] Music, [C] Video, [D] Reading materials, and [E] Ring tones.⁵¹

Further, the term "intrastate telecommunications service" is defined as telecommunications service that originates and terminates in Indiana.⁵²

The GA also added definitions to coincide with the definitions in the SST Agreement. All of these definitions are effective as of January 1, 2008. The GA added a definition of telecommunications "ancillary services" to I.C. § 6-2.5-1-11.3.⁵³ This term is defined to include detailed telecommunications billing, directory assistance, vertical services, and voice mail services.⁵⁴ "Prepaid wireless calling service" is now defined in I.C. §§ 6-2.5-1-22.4 and 6-2.5-12-11.5 as "a telecommunications service that provides the right to use mobile wireless services . . . [that] must be paid for in advance [] and are sold in predetermined units or dollars, the balance of which declines with use."⁵⁵ Further, the definition of "post paid calling service" was amended to exclude "a prepaid wireless calling service" for purposes of sourcing telecommunications.⁵⁶ Additionally, I.C. § 6-2.5-1-29 defines "value added nonvoice data service" to mean "a service that otherwise meets the definition of telecommunications services in which computer processing applications are used to act on the form, content, code, or protocol of the information or data primarily for a purpose other than transmission, conveyance, or routing."⁵⁷

The GA also modified the perimeters for what is considered to be a telecommunications retail transaction. The GA amended I.C. § 6-2.5-4-6 to provide that as of January 1, 2008, a person is making a retail transaction when the person sells an intrastate telecommunications service and receives gross retail income from billings or statements rendered to customers.⁵⁸ In contrast, a person

51. *Id.*

52. *Id.* § 6-2.5-1-20.3 (as added by 2007 Ind. Acts 2178).

53. 2007 Ind. Acts 2178.

54. *Id.*

55. *Id.* at 2178-79, 2185.

56. IND. CODE § 6-2.5-12-10 (Supp. 2007) (as amended by 2007 Ind. Acts 2185).

57. 2007 Ind. Acts 2180.

58. *Id.* at 2180-81.

is not providing telecommunications services when “the person furnishes telecommunications services to another person who is providing prepaid calling services or prepaid wireless calling services in a retail transaction to customers who access the services through the use of an access number,” the person “sells telecommunications services to a public utility, the person furnishes intrastate mobile telecommunications service . . . to a customer with a place of primary use that is not located in Indiana,” or the person “sells value added nonvoice data services in a retail transaction to a customer.”⁵⁹ Changes were also made to the general sourcing provisions regarding telecommunications services. The GA amended I.C. § 6-2.5-12-16 to determine the manner of sourcing for prepaid wireless calling services⁶⁰ and I.C. § 6-2.5-13-1 to provide that Internet access services and ancillary services are to be sourced in accordance with the telecommunications sourcing provisions.⁶¹ Finally, the GA repealed I.C. § 6-2.5-13-2, which provided for the multiple point of use exemption provision in regards to sourcing of digital goods and computer software delivered electronically.⁶²

2. *Exemptions.*—Select sales tax exemption provisions were also amended. A few of these modifications concern aircraft exemptions. The GA amended I.C. § 6-2.5-3-2 to provide a limited use tax exemption for an aircraft that is titled or registered in another state and is temporarily brought to Indiana to be repaired, refurbished, remanufactured, or subjected to a pre-purchase evaluation.⁶³ The GA amended I.C. § 6-2.5-5-8 to provide that an aircraft acquired by a person for rental or leasing is not exempt from the sales tax unless the person establishes that the annual amount of the lease revenue derived from leasing the aircraft is equal to or greater than 10% of the cost of the aircraft if the cost was less than \$1,000,000 or 7.5% if the cost is equal to or greater than \$1,000,000.⁶⁴ This section was also amended to provide that the provision concerning aircraft purchased exempt from the sales tax for leasing and required to meet certain financial thresholds to be considered engaged in leasing does not take effect until July 1, 2008 instead of July 1, 2007.⁶⁵ The GA also added I.C. § 6-2.5-5-42, which provides that effective July 1, 2007, an aircraft is exempt from the sales tax if the purchaser is a nonresident and the purchaser takes the aircraft outside of Indiana within thirty days after accepting delivery or a repair, refurbishment, or remanufacture of the aircraft is completed.⁶⁶ The purchaser is required to supply the seller with a copy of the purchaser’s registration or title for the state where the aircraft is registered or titled within sixty days.⁶⁷ The GA also eliminated the exemption for exporting an aircraft from Indiana within thirty days and then

59. *Id.*

60. *Id.* at 2185-87.

61. *Id.* at 2187-91.

62. *Id.* at 2191.

63. 2007 Ind. Acts 3030-31.

64. *Id.*

65. 2007 Ind. Acts 3089.

66. 2007 Ind. Acts 3033-34.

67. *Id.*

reinstated it in I.C. § 6-2.5-5-42.⁶⁸

Other sales tax exemption changes include the addition of a sales tax exemption for purchases of tangible personal property related to collection plant and expenses; system pumping plant and expenses; treatment and disposal plant and expenses; and the purchases made by a public utility or a person who contracts with a municipality for the collection, treatment, or processing of wastewater.⁶⁹ This new provision replaced the wording contained in I.C. § 6-2.5-5-12 and subsequently deleted the provision which provided a sales tax exemption for public utilities that operate wastewater treatment plants.⁷⁰ The GA also amended I.C. § 6-2.5-5-3 to clarify that distribution equipment and transmission equipment of a public utility engaged in generating electricity is not exempt from the sales tax as equipment directly used in direct production of electricity.⁷¹ An amendment to I.C. § 6-2.5-5-35 clarifies that electricity, gas, water, and steam are not considered a consumable exempt from the sales tax if used by restaurants or hotels.⁷² Furthermore, the GA added a provision to I.C. § 6-2.5-3-7 providing that as of July 1, 2007, a purchaser purchasing tangible personal property for use in public transportation may verify the purchaser's exemption by providing the purchaser's name, address, and motor carrier number; USDOT number; or any other identifying number authorized by the DOSR.⁷³ Finally, the sales tax exemption for the low-income home energy assistance program was extended until July 1, 2009.⁷⁴

3. *Miscellaneous Sales Tax Changes.*—The GA amended I.C. § 6-2.5-4-14 to provide that the department of administration and universities are required to provide a list to the DOSR of every person desiring to sell tangible personal property to the state or to a university, and to eliminate the provision requiring that a person providing services be included on the list.⁷⁵ The DOSR is also required to notify the department of administration or the university if the person is not a registered retail merchant or is delinquent in remitting sales tax.⁷⁶

The GA reduced the threshold for remitting the sales tax by EFT from \$10,000 to \$5000.⁷⁷ The collection allowance provided by the state to retailers in I.C. § 6-2.5-6-10 also changed.⁷⁸ The allowance remains at 0.83% on the first \$60,000 in sales tax liability accrued, but changes to 0.6% on the sales tax liability between \$60,001 and \$600,000, and for sales tax remittances greater than

68. *Id.* at 3032-33.

69. IND. CODE § 6-2.5-5-12.5 (Supp. 2007) (as added by 2007 Ind. Acts 1364-67).

70. 2007 Ind. Acts 1364.

71. 2007 Ind. Acts 3029-30.

72. *Id.* at 3031.

73. *Id.* at 3028-29.

74. IND. CODE § 6-2.5-5-16.5 (Supp. 2007) (as amended by 2007 Ind. Acts 1128).

75. 2007 Ind. Acts 3029.

76. *Id.*

77. IND. CODE § 6-2.5-6-1 (Supp. 2007) (as amended by 2007 Ind. Acts 3034-36).

78. *See* 2007 Ind. Acts 3036-37.

\$600,000, the collection allowance is now 0.3%.⁷⁹

The following changes were also made to the E85 sales tax deduction. The E85 sales tax deduction may now be claimed until June 30, 2020.⁸⁰ Additionally, the amount of the E85 sales tax deduction was increased from \$.10 to \$.18 per gallon, and the total amount of sales tax deductions that are available to all retail merchants for all years was reduced from \$2,000,000 to \$1,000,000.⁸¹ The GA added a provision that provides that to the extent that funds are available from the corn market development account, the \$1,000,000 cap for the E85 sales tax deduction does not apply.⁸² The DOSR is required to annually publish in the Indiana Register a notice of the amount of funds available for the reimbursement required from the corn market development fund for the E85 deduction.⁸³

Beginning January 1, 2008, I.C. § 6-2.5-8-8 provides “[a] seller that accepts an incomplete exemption certificate . . . is not relieved of the duty to collect gross retail . . . tax on the sale unless the seller obtains a fully completed exemption certificate within ninety (90) days after the sale.”⁸⁴ “If the seller has accepted an incomplete exemption certificate,” then the DOSR is to request the seller to “substantiate the exemption,” and the seller is to have 120 days to provide a completed exemption certificate or prove by other means that the transaction was an exempt transaction.⁸⁵

The GA also amended I.C. § 6-2.5-11-10 to provide that a certified service provider (“CSP”) or “a seller using a certified automated system that obtains a certification from the [DOSR] is not liable for sales . . . tax collection errors that result from reliance on the [DOSR’s] certification.”⁸⁶ “The [CSP] or the seller using a certified automated system must revise the incorrect classification within ten (10) days after receiving notice of the determination from the [DOSR].”⁸⁷ If the error is not corrected within ten days, then the CSP or the seller using a certified automated system is liable for failure to collect the correct amount of sales tax due.⁸⁸ A new provision, I.C. § 6-2.5-11-11, was also added to provide that a purchaser is relieved from liability for penalties for failure to pay the amount of tax due if the purchaser’s seller, a purchaser with a direct pay permit, or a purchaser relied on information provided by the DOSR regarding tax rates or the taxability matrix.⁸⁹ A purchaser is also relieved from liability and interest for failure to pay the correct amount of sales tax due.⁹⁰

79. *Id.*

80. IND. CODE § 6-2.5-7-5 (Supp. 2007) (as amended by 2007 Ind. Acts 2647-49).

81. *Id.*

82. *Id.* § 6-2.5-7-5.5 (as added by 2007 Ind. Acts 2990-91).

83. *Id.*

84. 2007 Ind. Acts 2181-82.

85. *Id.*

86. *Id.* at 2182-83.

87. *Id.*

88. *Id.*

89. *Id.* at 2183-84.

90. *Id.*

The GA also passed the following miscellaneous sales tax provisions. Effective January 1, 2008, I.C. § 6-2.5-8-1 provides the county assessor shall receive the information related to new sales tax registrations if the duties of the township assessor are transferred to the county assessor.⁹¹ Further, I.C. § 6-2.5-8-7 was amended to stipulate that the DOSR shall revoke a registered retail merchant after five days notice to the retail merchant if the DOSR finds in a public hearing that the holder of the permit has violated any of the professional gambling statutes.⁹² This requirement is eliminated with the adoption of the memorandum of understanding with the gaming commission. The GA also appropriated one hundred twenty-five thousandths of one percent to the public mass transportation fund from the deposits of the sales tax in the general fund.⁹³ Lastly, the GA repealed I.C. § 6-2.5-8-10, which required a person to register as a retail merchant even if they were not located in Indiana, but solicited business, sold property to the state or a university, or was closely related to another entity that maintained a place of business in Indiana.⁹⁴

D. Adjusted Gross Income Tax

During 2007, the GA clarified many provisions regarding military income. A new provision, I.C. § 6-3-1-34, defines “qualified military income” as wages paid to a member of the reserve component of the armed forces or the National Guard for full-time service on involuntary orders, the period during which the member is mobilized and deployed, or the period during which the person’s National Guard unit is federalized.⁹⁵ Effective January 1, 2008, I.C. § 6-3-1-3.5 provides that qualified military income that was included in federal adjusted gross income is deducted for purposes of determining Indiana adjusted gross income.⁹⁶ The military pay and military retirement income tax deduction in I.C. § 6-3-2-4 shall also increase from \$2000 to \$5000 in 2008.⁹⁷

Adjusted gross income tax legislation in 2007 also addressed patents. One new addition is a modification to adjusted gross income to provide a subtract-off for patent income that is included in federal adjusted gross income or federal taxable income for corporations.⁹⁸ The GA added an exemption from income for “qualified patents” in I.C. § 6-3-2-21.7 effective January 1, 2008.⁹⁹ A “qualified patent” is a “utility patent” or a “plant patent” issued after December 31, 2007, “for an invention resulting from a development process conducted in Indiana.”¹⁰⁰

91. 2007 Ind. Acts 3686-88.

92. 2007 Ind. Acts 4129-31.

93. IND. CODE § 6-2.5-10-1 (Supp. 2007) (as amended by 2007 Ind. Acts 4455-70).

94. 2007 Ind. Acts 3089.

95. 2007 Ind. Acts 2163.

96. *Id.* at 2155-63.

97. *Id.*

98. IND. CODE § 6-3-1-3.5 (Supp. 2007) (as amended by 2007 Ind. Acts 3841-49).

99. 2007 Ind. Acts 3849.

100. *Id.*

The “term does not include a design patent.”¹⁰¹ A “qualified taxpayer” is an individual or corporation with less than 500 employees or a nonprofit organization, which is in either case domiciled in Indiana.¹⁰² The exemption includes “[l]icensing fees or other income received for the use of a qualified patent, [r]oyalties received for the infringement, receipts from the sale of a qualified patent, and income from the taxpayer’s own use of the taxpayer’s qualified patent to produce the claimed invention.”¹⁰³ However, the total amount of exemptions claimed by a taxpayer in a taxable year may not exceed \$5,000,000, and it may not be claimed for more than ten years.¹⁰⁴ For the first five years, 50% of the amount of income received from the patent is exempt, and the percentage declines by 10% each year starting in the sixth year that the exemption is claimed.¹⁰⁵ The taxpayer is required to claim the exemption on the qualified taxpayer’s state tax return and is to submit all information the DOSR determines necessary for the determination of the exemption.¹⁰⁶

Additionally, the GA passed the following miscellaneous provisions. The GA amended I.C. § 6-3-1-3.5 to require corporations to add back any deduction for dividends paid to shareholders of a captive real estate investment trust.¹⁰⁷

A new provision, I.C. § 6-3-1-34.5, defines a “captive real estate investment trust” as

a corporation, a trust, or an association: (1) that is considered a real estate investment trust for the taxable year under Section 856 of the IRC; (2) that is not regularly traded on an established securities market; and (3) in which more than fifty percent (50%) of the: (A) voting power; (B) beneficial interests; or (C) shares; are owned or controlled . . . by a single entity.¹⁰⁸

A retroactive amendment to I.C. § 6-3-3-12 provides that an owner of a college choice 529 education savings plan that makes a non-qualified withdrawal must repay all or part of the credit in the taxable year in which the non-qualified withdrawal was made.¹⁰⁹

The amount the taxpayer must repay is equal to the lesser of: (1) twenty percent (20%) of the total amount of non-qualified withdrawals made during the taxable year from the account; or (2) the excess of . . . the cumulative amount of all credits provided by this section that are claimed by a taxpayer with respect to the taxpayer’s contributions to the account

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. 2007 Ind. Acts 3037-45.

108. *Id.* at 3045-46.

109. *Id.* at 3051-53.

for all taxable years beginning on or after January 1, 2007. . . .¹¹⁰

Any required repayment shall be made “on the account owner’s annual income tax return for any taxable year in which a non-qualified withdrawal is made.”¹¹¹

The GA added I.C. § 6-3-4-1.5 to provide that if a professional preparer files more than 100 tax returns in a calendar year for individuals, then the paid preparer is to file returns for individuals in an electronic format for the subsequent year as specified by the DOSR.¹¹²

The following amendments concern estimated payments. An amendment to I.C. § 6-3-4-4.1 provides that if an individual’s annual unpaid liability is less than \$1000, the taxpayer is not required to file quarterly estimated payments.¹¹³ The previous amount was \$400.¹¹⁴ A corporation for taxable years beginning after December 15, 2007, is also not required to file quarterly estimated payments if its annual unpaid liability is less than \$2500.¹¹⁵ The previous limitation was \$1000.¹¹⁶ Corporations required to make quarterly estimated payments are permitted to use “the annualized income installment calculated in the manner provided by section 6655(e) of the Internal Revenue Code as applied to the corporation’s liability for adjusted gross income tax.”¹¹⁷ Furthermore, this section also reduces the filing threshold for EFT payments for corporate estimated taxes from \$10,000 to \$5000.¹¹⁸

The GA changed the requirement for monthly withholding taxes to be remitted by EFT from \$10,000 to \$5000.¹¹⁹ Partnerships that have nonresident partners are also required to file a composite return which includes all nonresident partners.¹²⁰ A nonresident is not prohibited from being part of the composite return if they have other income from Indiana.¹²¹ S corporations that have nonresident shareholders are also required to file a composite return for all nonresident shareholders, including nonresident shareholders that have no other income from Indiana.¹²²

The GA also updated the definition of “adjusted gross income” in I.C. § 6-3-1-11 to correspond to the federal definition of “adjusted gross income” which is contained in the IRC.¹²³ Provisions that are incorporated into the definition of

110. *Id.*

111. *Id.*

112. *Id.* at 3053.

113. *Id.* at 3053-55.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. IND. CODE § 6-3-4-8.1 (Supp. 2007) (as amended by 2007 Ind. Acts 3055-56).

120. *Id.* § 6-3-4-12 (as amended by 2007 Ind. Acts 3057-58).

121. *Id.*

122. *Id.* § 6-3-4-13 (as amended by 2007 Ind. Acts 3059-61).

123. 2007 Ind. Acts 4613-14.

adjusted gross income include an extension of the deduction for higher education expenses, a temporary extension of the deduction for teachers' classroom expenses, a deduction for environmental remediation expenses, and depreciation of leasehold and restaurant improvements.¹²⁴

E. Tax Credits

The GA created the following new tax credits in 2007. One new retroactive tax credit contained in I.C. § 6-3.1-31 rewards employers offering health benefit plans.¹²⁵ An employer that did not provide health insurance to its employees prior to January 1, 2007, and makes health insurance available to the employees is entitled to a credit for the first two years in which the taxpayer makes the plan available if the employer provides that participation is at the employee's election. The employee may have the premiums withheld from his paycheck.¹²⁶ The amount of the credit is the lesser of \$2500 or \$50 multiplied by the number of employees enrolled in the health benefit plan.¹²⁷ A taxpayer is to claim the credit on the taxpayer's state tax return, and the taxpayer is required to make health insurance available to the employer's employees for at least two years after the taxable year for which the employer first offers the health benefit plan.¹²⁸

The GA also added I.C. § 6-3.1-31.2, which creates a small employer qualified wellness program tax credit that is retroactive.¹²⁹ A "small employer" is "an employer that: (1) is actively engaged in business; and (2) . . . employed at least two (2) but not more than one hundred (100), eligible employees, the majority of whom work in Indiana."¹³⁰ A small employer is entitled to a tax credit "equal to fifty percent (50%) of the costs incurred by the [employer] during the taxable year for providing a qualified wellness program for the [employer's] employees during the taxable year."¹³¹ The credit can be carried forward but cannot be carried back or refunded.¹³² To receive the credit the employer must provide a copy of the certificate received from the State Department of Health and claim the credit on the taxpayer's state income tax return.¹³³ The provision also contains reporting provisions for the DOSR.¹³⁴

Another new tax credit passed concerns expenditures on energy star heating and cooling equipment incurred by taxpayers.¹³⁵ The tax credit effective January

124. *Id.*

125. *See* 2007 Ind. Acts 3491-94.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 3494-96.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *See* IND. CODE § 6-3.1-31.5 (Supp. 2007) (as added by 2007 Ind. Acts 2578-80).

1, 2008, is “equal to the lesser of . . . (1) twenty percent (20%) of the amount of expenditures for energy star heating and cooling equipment incurred by the taxpayer in a taxable year[] or (2) one hundred dollars (\$100).”¹³⁶ A pass through entity is also eligible for the credit, and the credit may not exceed the taxpayer’s tax liability.¹³⁷ There is no carry back, carry forward, or refund of any unused credit, and the total amount of tax credits may not exceed \$1,000,000 in a state fiscal year.¹³⁸ Further, the credit may not be awarded to a taxpayer for taxable years beginning after December 31, 2010.¹³⁹

The GA also passed a new retroactive tax credit for alternative fuel manufacturers.¹⁴⁰ This new tax credit provides a credit of up to 15% of the “qualified investment.”¹⁴¹ A “qualified investment” includes “the purchase of new telecommunications, production, manufacturing, fabrication, assembly, finishing, distribution, transportation, or logistical distribution equipment.”¹⁴² The term also includes computer equipment, “costs associated with modernization” of equipment and facilities, “onsite infrastructure improvements,” construction of new manufacturing facilities, retooling existing machinery and equipment, and costs associated with the construction of special purpose buildings that are certified by the EDC as being eligible for the credit.¹⁴³ An “alternative fuel vehicle” is any vehicle designed to operate using methanol, denatured ethanol, E85, natural gas, liquefied petroleum gas, hydrogen, coal derived liquid fuels, non-alcohol fuels derived from biological material, P-Series fuels, or electricity.¹⁴⁴ The EDC may make credit awards to foster job creation, reduce dependency on foreign oil, and reduce air pollution.¹⁴⁵ A taxpayer may carry forward an unused credit for nine years.¹⁴⁶ A person that proposes a project to manufacture or assemble alternative fuel vehicles may apply to the EDC before the qualified investment is made.¹⁴⁷ After receipt of the application, the EDC may enter into an agreement with the applicant.¹⁴⁸ A taxpayer claiming the credit is required to submit a copy of the certificate of verification from the EDC.¹⁴⁹ If a taxpayer does not comply with the agreement, then after notification from the EDC, the DOSR may make an assessment against the taxpayer up to the amount

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* § 6-3.1-31.5-13 (as amended by 2007 Ind. Acts 3061).

140. *See id.* § 6-3.1-31.9 (as added by 2007 Ind. Acts 3852).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

of previously allowed credits.¹⁵⁰ The EDC may not award any credits for qualified investments made after December 31, 2012.¹⁵¹ Moreover, the GA amended I.C. § 6-3.1-1-3 to include this tax credit as one that the taxpayer cannot claim multiple credits for the same project.¹⁵²

The GA created a new tax credit to provide \$20,000,000 for all taxable years for all taxpayers who produce at least 20,000,000 gallons of cellulosic ethanol in a taxable year.¹⁵³ The credit may only be applied against the state tax liability attributable to business activity taking place at the Indiana facility at which the cellulosic ethanol was produced.¹⁵⁴ The GA amended I.C. § 6-3.1-27-9.5 to clarify that the credit created for cellulosic ethanol is not included in the \$50,000,000 cap for biodiesel production and blending and for ethanol production.¹⁵⁵ Further, under I.C. § 6-3.1-28-9 ethanol production credit may not be sold, assigned, conveyed, or otherwise transferred.¹⁵⁶

The GA made the following changes to other fuel-related credits. The GA amended I.C. § 6-3.1-29-6 to state that the coal gasification tax credit includes a facility that is located in Indiana and that converts coal into synthesis gas that can be used as a substitute for natural gas.¹⁵⁷ Additionally, I.C. § 6-3.1-29-15 now provides that the coal gasification tax credit shall be awarded for the development of a facility that will serve gas utility consumers, in addition to electric utility consumers that are already allowed for in the statute.¹⁵⁸ A new provision, I.C. § 6-3.1-29-20.5, provides that all or part of the integrated coal gasification power plant tax credit to which a taxpayer is entitled is assignable to one or more utilities if the assignment has been approved by the utility regulatory commission and provides for the purchase of electricity or substitute natural gas by the utility from the taxpayer.¹⁵⁹ If the credit is assigned, then the credit must be taken in twenty annual installments.¹⁶⁰ The total amount of credit that may be assigned is the total credit awarded divided by twenty and then multiplied by the percentage of Indiana coal used in the taxpayer's integrated coal gasification power plant.¹⁶¹

The GA also amended I.C. § 6-3.1-24-9 to extend the time period for which investments must be made to claim the venture capital investment tax credit for providing qualified investment capital from January 1, 2009, to January 1, 2013.¹⁶²

150. *Id.*

151. *Id.*

152. 2007 Ind. Acts 3858-62.

153. See IND. CODE § 6-3.1-28-11 (Supp. 2007) (as added by 2007 Ind. Acts 2573-74).

154. *Id.*

155. 2007 Ind. Acts 2573.

156. *Id.*

157. *Id.* at 2574-75.

158. *Id.* at 2575.

159. *Id.* at 2577-78.

160. *Id.*

161. *Id.*

162. 2007 Ind. Acts 3061.

F. Local Taxation

1. *County Adjusted Gross Income Tax ("CAGIT")*.—The GA amended several dates for county ordinances seeking to impose or adjust the CAGIT. First, a county wishing to impose CAGIT must adopt an ordinance after March 31 and before August 1 of a particular year.¹⁶³ The ordinance shall then take effect on October 1.¹⁶⁴ Similarly, an ordinance to rescind CAGIT must be adopted after March 31 and before August 1 to be effective on October 1 of the year the ordinance is adopted.¹⁶⁵ Ordinances to increase¹⁶⁶ or decrease¹⁶⁷ CAGIT must also be adopted after March 31 and before August 1 to be effective on October 1 of the year the ordinance is adopted. Counties may also adopt an ordinance by August 1 to impose an additional CAGIT effective on October 1.¹⁶⁸ The additional rate that is determined is effective for two years.¹⁶⁹ A county may not decrease or rescind the tax rate once it is imposed.¹⁷⁰ One-half of the revenue from the tax rate imposed is to be deposited in the county stabilization fund. The maximum rate that a county may impose under this section to replace property tax levy growth is 1%.¹⁷¹ A county may also now impose an additional CAGIT rate of up to 1% imposed at increments of 0.05% to be used for property tax replacement credits for all property, homestead credits, or property tax replacement credits for qualified residential property.¹⁷² The rate is in addition to any other rate imposed.¹⁷³ A county is not required to impose any other tax before imposing a tax rate under this section.¹⁷⁴ The rate is to be imposed, rescinded, increased, or decreased in the same manner and at the same time as required under I.C. § 6-3.5-1.1-24.¹⁷⁵ Additionally, if a county has imposed a tax rate under I.C. § 6-3.5-1.1-24 for property tax replacement credits and I.C. § 6-3.5-1.1-26 for property tax relief, then the county may adopt an ordinance to provide an additional tax rate for public safety.¹⁷⁶ The maximum tax rate is the lesser of 0.25% or the rate imposed under I.C. § 6-3.5-1.1-26.¹⁷⁷ The tax rate may be imposed or rescinded by adopting an ordinance by August 1 of a year to be

163. IND. CODE § 6-3.5-1.1-2 (Supp. 2007) (as amended by 2007 Ind. Acts 3940-41).

164. *Id.*

165. *Id.* § 6-3.5-1.1-4 (as amended by 2007 Ind. Acts 3947-48).

166. *Id.* § 6-3.5-1.1-3 (as amended by 2007 Ind. Acts 3945).

167. *Id.* § 6-3.5-1.1-3.1 (as amended by 2007 Ind. Acts 3945-46).

168. *Id.* § 6-3.5-1.1-24 (as amended by 2007 Ind. Acts 3955-59).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* § 6-3.5-1.1-26 (as amended by 2007 Ind. Acts 3962-64).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* § 6-3.5-1.1-25 (as amended by 2007 Ind. Acts 3960-62).

177. *Id.*

effective on October 1 of the same year.¹⁷⁸

The GA also passed the following county-specific CAGIT provisions. The GA amended I.C. § 6-3.5-1.1-2.3 to provide that if Jasper County desires to increase CAGIT to fund a jail, then the ordinance must be adopted before August 1 to be effective on October 1 of the year of adoption.¹⁷⁹ If the ordinance is adopted after August 1, then the increased tax rate shall not be effective until October 1 of the subsequent year.¹⁸⁰ Further, the I.C. § 6-3.5-1.1-2.6 was added to provide that Parke County may adopt an ordinance to impose additional CAGIT up to 0.25% for the cost of a capital trial.¹⁸¹

2. *Levy Freeze Limits*.—The GA added I.C. § 6-3.5-1.5, which requires the DOSR to be involved with the DLGF in determining the levy freeze limits that are created.¹⁸²

3. *County Wheel Tax*.—Effective July 1, 2007, an owner of a commercial motor vehicle paying an apportioned registration under the International Registration Plan that is required to pay a wheel tax must now pay an apportioned wheel tax based on Indiana miles compared to total miles.¹⁸³ The apportioned wheel tax must be paid at the same time and in the same manner as the commercial motor vehicle excise tax.¹⁸⁴ This provision only applies to a wheel tax adopted after June 30, 2007.¹⁸⁵ A voucher from the DOSR showing proof of payment may be accepted by the BMV in lieu of the payment.¹⁸⁶ If a wheel tax for a commercial vehicle is collected directly by the DOSR, then the DOSR is to remit the wheel tax, file a wheel tax collections report with the appropriate county treasurer, and file a wheel tax collections report with the county auditor by the tenth day of the month following the month in which the wheel tax was collected.¹⁸⁷

4. *County Option Income Tax ("COIT")*.—Similar to the CAGIT, the GA amended the dates when counties have to impose or adjust the COIT. First, a county imposing COIT must adopt an ordinance after March 31 and before August 1 to be effective on October 1.¹⁸⁸ Counties must also adopt ordinances increasing,¹⁸⁹ decreasing,¹⁹⁰ freezing,¹⁹¹ or rescinding¹⁹² the COIT between March

178. *Id.*

179. 2007 Ind. Acts 3941-44.

180. *Id.*

181. *Id.* at 3944-45.

182. *Id.* at 3965-67.

183. IND. CODE § 6-3.5-5-9.5 (Supp. 2007) (as added by 2007 Ind. Acts 3062).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* § 6-3.5-5-13 (as added by 2007 Ind. Acts 3063).

188. IND. CODE § 6-3.5-6-8 (Supp. 2007) (as amended by 2007 Ind. Acts 3967-68).

189. *Id.* § 6-3.5-6-9 (as amended by 2007 Ind. Acts 3968).

190. *Id.* § 6-3.5-6-12.5 (as amended by 2007 Ind. Acts 3970).

191. *Id.* § 6-3.5-6-11 (as amended by 2007 Ind. Acts 3968-69).

192. *Id.* § 6-3.5-6-12 (as amended by 2007 Ind. Acts 3969-70).

31 and August 1 to be effective on October 1. The GA also added provisions allowing counties to impose additional COIT rates. A county can impose an additional COIT rate of up to 1% with the additional funds to be used partially for homestead credits and partially to be deposited into the county stabilization fund (one-third of the tax revenue for Marion County and 50% of the tax revenue in all other counties).¹⁹³ A county may also impose an additional COIT rate for public safety.¹⁹⁴ The additional rate for public safety in Marion County may be imposed at a rate of up to 0.5% if Marion County imposed the additional rate provided for in I.C. § 6-3.5-6-30.¹⁹⁵ In all other counties, each county can impose an additional rate for public safety of up to 0.25% or the tax rate imposed under I.C. § 6-3.5-6-32, whichever is less.¹⁹⁶ All counties other than Marion County must impose an additional rate under I.C. § 6-3.5-6-30 and I.C. § 6-3.5-6-32 before they are eligible to impose the additional rate for public safety.¹⁹⁷ Furthermore, a county may impose an additional COIT rate of up to 1% to be used to provide property tax relief.¹⁹⁸ A county is not required to adopt any other tax before imposing a tax rate under this section.¹⁹⁹ Finally, the GA amended I.C. § 6-3.5-6-18 to prohibit the use of the additional COIT revenues provided by these new provisions to finance a qualified economic development tax project under I.C. § 36-7-27.²⁰⁰

The GA also passed the following county-specific provisions. The GA amended I.C. § 6-3.5-6-28 to provide that, effective retroactively, Howard County's additional COIT that was previously authorized to be imposed at 0.25% may now be imposed at any increment up to 0.25%.²⁰¹ This section also requires the DOSR to separately designate a tax rate imposed under this section in any tax form as the Howard County jail operating and maintenance income tax.²⁰² The GA also amended I.C. § 6-3.5-6-29 to provide that Scott County has until July 31 to adopt an ordinance to impose the additional COIT authorized for a county jail revenue fund to be imposed on October 1.²⁰³ The GA added I.C. § 6-3.5-6-33, which authorizes Monroe County to impose an additional COIT rate of up to 0.25% for a juvenile detention center.²⁰⁴

5. *County Economic Development Income Tax ("CEDIT")*.—To provide uniformity, the GA amended I.C. § 6-3.5-7-5 to change the dates for adopting an

193. *Id.* § 6-3.5-6-30 (as added by 2007 Ind. Acts 3980-85).

194. *Id.* § 6-3.5-6-31 (as added by 2007 Ind. Acts 3985-88).

195. *Id.*

196. *Id.*

197. *Id.*

198. IND. CODE § 6-3.5-6-32 (Supp. 2007) (as added by 2007 Ind. Acts 3988-91).

199. *Id.*

200. 2007 Ind. Acts 3974-76.

201. *Id.* at 3976-78.

202. *Id.*

203. *Id.* at 3978-80.

204. *Id.* at 3991-93.

ordinance to impose, increase, decrease, or rescind the CEDIT.²⁰⁵ An ordinance must be adopted after March 31 and before August 1 to be effective on October 1.²⁰⁶ The GA also added I.C. § 6-3.5-7-28, which authorizes a county that is a member of a regional development authority to adopt an ordinance to increase the county's CEDIT rate by 0.05% and requires the revenue to be deposited in the county regional development authority fund.²⁰⁷

G. Inheritance Tax

The GA clarified I.C. § 6-4.1-10-1, providing that if an inheritance tax payment that was "erroneously or illegally collected is not refunded within ninety (90) days after the date on which the refund claim is filed," then interest accrues at 6% per annum from the date the claim was filed until the refund is paid.²⁰⁸

H. Financial Institutions Tax

The GA added a modification to the financial institutions tax to provide a subtract-off for patent income that is included in adjusted gross income for financial institutions.²⁰⁹ The GA also changed I.C. § 6-5.5-6-3 to provide that a taxpayer subject to the financial institutions tax is not required to make quarterly estimated tax payments if the annual tax liability is less than \$2500 instead of the previous amount of \$1000.²¹⁰ This section also reduces the threshold for filing EFT payments from \$10,000 to \$5000.²¹¹

I. Motor Fuel and Vehicle Excise Taxes

1. *Gasoline Tax.*—The GA reduced the threshold for making EFT payments in regard to gasoline and special fuel taxes from \$10,000 to \$5000.²¹²

2. *Special Fuel Tax.*—The GA passed a new exemption from the special fuel tax for special fuel that has a nominal biodiesel content of at least 20%, is only used for personal use, and the individual using the special fuel produced the special fuel.²¹³ The maximum number of gallons that the person may claim exempt is equal to 2000 gallons divided by "the average percentage volume of biodiesel in each gallon used by the individual."²¹⁴

3. *Motor Carrier Fuel Tax.*—The GA amended I.C. § 6-6-4.1-2 to provide an exemption from the motor carrier fuel tax for a pickup truck that is modified

205. *Id.* at 3993-98.

206. *Id.*

207. 2007 Ind. Acts 4215-17.

208. 2007 Ind. Acts 3063.

209. IND. CODE § 6-5.5-1-2 (Supp. 2007) (as amended by 2007 Ind. Acts 4215-17).

210. 2007 Ind. Acts 3063-64.

211. *Id.*

212. IND. CODE § 6-6-1.1-502 (Supp. 2007) (as amended by 2007 Ind. Acts 3063-64).

213. *Id.* § 6-6-2.5-30.5 (as added by 2007 Ind. Acts 1130-31).

214. *Id.*

to include a third free rotating axle where the gross vehicle weight is less than 26,000 pounds and the vehicle is operated for personal and not commercial use.²¹⁵

4. *Aircraft License Excise Tax*.—The GA amended I.C. § 6-6-6.5-1 to define a “repair station” to be “a person who holds a repair station certificate that was issued to the person by the Federal Aviation Administration under 14 CFR Part 145.”²¹⁶ Additionally, the GA amended I.C. § 6-6-6.5-2 to provide that if a nonresident bases an aircraft in Indiana with a repair station solely for repairing, remodeling, or refurbishing the aircraft, then the nonresident is not required to register the aircraft with the DOSR.²¹⁷ The repair station is required to report quarterly to the DOSR the “N” number of the aircraft that were based in the State at the end of each calendar quarter.²¹⁸

J. Tobacco Taxes

Effective July 1, 2007, the cigarette tax increased from \$.555 to \$.995 per pack.²¹⁹ The tax on other tobacco products increased from 18% to 24% of the wholesale price of the other tobacco products.²²⁰ The discount that cigarette distributors are allowed to retain also increased from two-thirds of a cent per pack to one and two-tenths cents per pack.²²¹

Distribution of the cigarette tax also changed. Starting August 1, 2007, 27.05% of the money is deposited in the Indiana check-up plan trust fund, 2.46% is deposited in the state general fund to pay for Medicaid provider reimbursements, 4.1% is deposited in the state general fund to be used to pay for any appropriation for a health initiative, and 2.46% is used to reimburse the general fund for the income tax credit for offering health benefit plans.²²² All funds currently receiving cigarette tax funding shall have their percentage of distribution reduced.²²³ Also effective August 1, 2007, 25% of the taxes, fees, fines, or penalties relating to the other tobacco products are to be transferred to the affordable housing and community development fund.²²⁴

The GA added a new provision allowing a bad debt deduction if a cigarette distributor fails to collect from a retailer the cigarette tax for cigarettes that the distributor has distributed to the retailer.²²⁵ A bad debt deduction is also allowed if another tobacco products distributor fails to collect from a retailer the other tobacco products tax for the other tobacco products that the distributor has

215. 2007 Ind. Acts 1004-05.

216. *Id.* at 1005-07.

217. *Id.* at 1007.

218. *Id.*

219. IND. CODE § 6-7-1-12 (Supp. 2007) (as amended by 2007 Ind. Acts 3488-89).

220. *Id.* § 6-7-2-7 (as amended by 2007 Ind. Acts 4723).

221. *Id.* § 6-7-1-17 (as amended by 2007 Ind. Acts 3065-66).

222. *Id.* § 6-7-1-28.1 (as amended by 2007 Ind. Acts 3490-91).

223. *Id.*

224. *Id.* § 6-7-2-17 (as amended by 2007 Ind. Acts 4723-24).

225. *Id.* § 6-7-1-17.5 (as added by 2007 Ind. Acts 3066-68).

delivered to the retailer.²²⁶

K. Tax Administration

1. *Collection.*—The GA added a new provision, I.C. § 6-8.1-8-8.7, which requires the DOSR to operate a data match system with each financial institution doing business in Indiana.²²⁷ Each financial institution doing business in Indiana must provide information to the DOSR regarding all account holders on a quarterly basis.²²⁸ The information must be supplied by comparing records maintained by the financial institution with records provided by the DOSR or by having the Child Support Bureau make its reports available to the DOSR.²²⁹ When there is a determination that a match has been made, the DOSR shall provide a notice of the match if action is to be initiated to levy the account.²³⁰ The DOSR or the collection agency is then required to pay the financial institution performing the data match a fee established by the DOSR of at least five dollars for each data match.²³¹

2. *Refunds.*—The GA amended I.C. § 6-8.1-9-1 to require the DOSR to hold a hearing if the taxpayer requests a hearing concerning a claim for refund by changing the discretionary language of “may” to “shall.”²³²

The GA also amended both I.C. §§ 6-8.1-9-14 and 6-8.1-9.5-10 to provide that the DOSR “may not assess a fee to a state agency or a custodial parent for seeking a setoff to a state . . . tax refund for past due child support.”²³³

3. *Penalties and Interest.*—A retroactive amendment to I.C. § 6-8.1-10-1 provides that the interest rate that the DOSR charges on a tax deficiency and the interest rate that the DOSR pays on an excess tax payment shall be the same. Further, this amendment requires the treasurer of state to notify the commissioner on or before October 1 of the average investment yield of the State for the previous fiscal year.²³⁴ Further, starting January 1, 2008, a penalty of \$500 shall be imposed under I.C. § 6-8.1-10-2.1 for a partnership or S corporation that fails to file a composite return for all nonresident shareholders.²³⁵

4. *Miscellaneous.*—Under I.C. § 6-8.1-3-2.5 the DOSR may adopt production quotas or goals for employees, but it is still prohibited from basing an employee evaluation on the amount of revenue collected or tax liability assessed.²³⁶

226. *Id.* § 6-7-2-14.5 (as added by 2007 Ind. Acts 3068-70).

227. 2007 Ind. Acts 4070-72.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. 2007 Ind. Acts 3072-73.

233. 2007 Ind. Acts 1678-80.

234. 2007 Ind. Acts 3073-74.

235. *Id.* at 3074-76.

236. *Id.* at 3071.

The GA amended I.C. § 6-8.1-6-3 to state that an electronic payment shall be considered timely “on the date the taxpayer issues the payment order for the electronic funds transfer, instead of current law which provides that the payment is considered timely on the date the taxpayer’s bank account is charged.”²³⁷

The GA amended I.C. § 6-8.1-1-1 to include the slot machine wagering tax as a listed tax for purposes of tax administration by the DOSR.²³⁸

The GA added a new provision that requires the DOSR to enter into “a memorandum of understanding with the Indiana gaming commission authorizing the commission’s unlawful gaming enforcement division to conduct actions to revoke retail merchant certificates” in the manner specified in the memorandum of understanding.²³⁹

The GA amended I.C. § 6-8.1-7-1 to provide that the county assessor is included along with the township assessor as an office that can receive the name and address of retail merchants.²⁴⁰

L. Innkeepers’ and Food and Beverage Taxes

Effective January 1, 2008, the Lake County innkeepers’ tax distribution method changes to reflect increases in the various distributions.²⁴¹

Starting July 1, 2007, Vanderburgh County may increase its maximum innkeepers’ tax rate from 6% to 8%.²⁴² Additionally, from July 1, 2007 through December 31, 2009, the Vanderburgh County treasurer is to deposit in the tourism capital improvement fund the amount of revenue generated from a 3.5% rate, and from January 1, 2010, the fund is to receive the amount of tax generated from a rate of 4.5%.²⁴³

Allen County may also increase its innkeepers’ tax starting July 1, 2007, from 6% to 7% to provide grants to the convention and visitor bureau.²⁴⁴

M. Motor Carrier Services

Definitions of “freight forwarders,” “brokers,” and “leasing companies” are now included in I.C. §§ 8-2.1-17-2, 8-2.1-17-7.5, and 8-2.1-17-9.1.²⁴⁵ Under revised I.C. § 8-2.1-20-4, the freight forwarders, brokers, and leasing companies are all subject to regulation by the DOSR if they hold themselves out as a provider of transportation or property for compensation.²⁴⁶

A new retroactive provision added to I.C. § 8-2.1-20-9 clarifies that if there

237. *Id.* at 3071-72.

238. 2007 Ind. Acts 4303-04.

239. IND. CODE § 6-8.1-3-20 (Supp. 2007) (as added by 2007 Ind. Acts 4131).

240. 2007 Ind. Acts 3688-90.

241. IND. CODE § 6-9-2-2 (Supp. 2007) (as amended by 2007 Ind. Acts 3076-80).

242. *Id.* § 6-9-2.5-6 (as amended by 2007 Ind. Acts 4008-09).

243. *Id.* § 6-9-2.5-7.5 (as amended by 2007 Ind. Acts 4009-10).

244. *Id.* § 6-9-9-3 (as amended by 2007 Ind. Acts 4010-11).

245. 2007 Ind. Acts 1190-91.

246. *Id.* at 1191.

is a conflict between Indiana law and the unified carrier registration system and the regulations adopted by the United States Secretary of Transportation, then the federal statute and regulations control.²⁴⁷

Another retroactive provision provides that household movers, transporters of non-liquid bulk fertilizers, trucks transporting chemicals for snow removal, and aggregate transporters whose trucks weigh less than 46,000 pounds shall be subject to the statutes regulating motor carriers that operate intrastate.²⁴⁸

The GA amended I.C. § 8-2.1-24-4 to provide that the DOSR may certify a motor carrier transporting passengers and may regulate and supervise safety, insurance, methods, and hours of operation of a motor carrier providing transportation of passengers.²⁴⁹

The GA amended I.C. § 8-2.1-24-21 to specify that a motor carrier must display a United States Department of Transportation number on each motor vehicle that the motor carrier operates.²⁵⁰

Finally, the GA amended I.C. § 8-2.1-24-18 to incorporate federal regulations concerning drug and alcohol testing, consumer protection regulations for interstate household movers, and special training requirements for longer combination vehicles into the motor carrier laws.²⁵¹ The amendment also provides that a person engaged in the construction business is not required to have a commercial driver's license.²⁵²

N. Miscellaneous Provisions

To help the effort to secure Indianapolis a bid for Super Bowl XLV, the GA enacted I.C. § 6-8-12, which adds a new chapter to provide the NFL and all of the NFL's affiliates with an exemption from all taxes for property owned, revenues received, and expenditures and transactions of the entities.²⁵³ This chapter also provides that the sales of tickets for the Super Bowl are not to be subject to the admissions tax.²⁵⁴

The GA also added I.C. § 4-33-19, which creates the license control division within the gaming commission.²⁵⁵ The division is established to conduct administrative enforcement actions against licensed entities engaged in unlawful gambling.²⁵⁶ A licensed entity includes a holder of a retail merchant's certificate.²⁵⁷ The division shall conduct a license revocation hearing on behalf

247. *Id.* at 1192.

248. IND. CODE § 8-2.1-24-3 (Supp. 2007) (as amended by 2007 Ind. Acts 1194-95).

249. 2007 Ind. Acts 1195-96.

250. *Id.* at 1196-97.

251. 2007 Ind. Acts 991-95.

252. *Id.*

253. 2007 Ind. Acts 3070-71.

254. *Id.*

255. 2007 Ind. Acts 4116-18.

256. *Id.*

257. *Id.*

of the DOSR.²⁵⁸ A memorandum of understanding between the commission and the DOSR is required to authorize the division's license revocation actions.²⁵⁹ The memorandum of understanding must be completed before January 1, 2008, and must describe the responsibilities of each participating agency.²⁶⁰

The GA added I.C. § 4-35-8-1 to create the slot machine wagering tax and require the tax to be remitted to the DOSR on a daily basis.²⁶¹ The deposit must be made by the close of the business day following the day the wagers were made.²⁶² Further, the DOSR may require the payments to be made by electronic funds transfer and allows the licensee to file a monthly report to reconcile the amounts remitted to the DOSR.²⁶³ The payment of the tax is to be accompanied by a form prescribed by the DOSR, and the money from the slot machine tax is to be deposited by the DOSR in the property tax reduction trust fund.²⁶⁴

The GA amended I.C. § 5-22-16-4 to eliminate the provision that a person selling services to the state must get a tax clearance from the DOSR.²⁶⁵ However, the clearance is still required for a person selling tangible personal property.²⁶⁶

The GA amended I.C. § 9-28-4-6 to clarify the due date for vehicles registered under the International Registration Plan to be due within fifteen days after the mailing date on the bill.²⁶⁷

The GA repealed the annual \$2.00 renewal fee for a permanent semitrailer registration.²⁶⁸

The GA amended I.C. § 15-4-10-24.5 to provide that the corn market development account shall reimburse the state for the E85 sales tax deduction.²⁶⁹ Annually beginning on July 1, 2008, the budget agency shall transfer from the corn market development account an amount equal to the lesser of 25% of the amount in the account or the sum of all deductions allowed for the E85 sales tax deduction.²⁷⁰

O. Noncode Provisions

Public Law 3-2007, Section 1 extends the nursing home quality care assessment fee from August 1, 2007 until August 1, 2009.²⁷¹

258. *Id.*

259. *Id.*

260. *Id.*

261. 2007 Ind. Acts 4266-4302.

262. *Id.*

263. *Id.*

264. *Id.*

265. 2007 Ind. Acts 3023-24.

266. *Id.*

267. 2007 Ind. Acts 1197-98.

268. IND. CODE § 9-29-5-6 (Supp. 2007) (as amended by 2007 Ind. Acts 1283).

269. 2007 Ind. Acts 2999-3000.

270. *Id.*

271. 2007 Ind. Acts 951-55.

Public Law 211-2007, Section 54 retroactively provides that a retail merchant that accepted Form ST-135 as a sales tax exemption certificate for a person engaged in transportation can request a refund for taxes, penalties, and interest paid to the DOSR or request the DOSR to satisfy any outstanding liabilities.²⁷² These options are available until December 31, 2008.²⁷³

Public Law 145-2007, Section 17 was added to provide that the Governor and DOSR Commissioner "shall take the steps necessary for Indiana to become an associate member of the Multistate Tax Commission."²⁷⁴

Public Law 16-2007, Section 4 provides that the exemption provided in I.C. § 6-2.3-4-6 (Utility Receipts Tax) does not mean that the gross receipts were taxable before the enactment of this exemption.²⁷⁵

Public Law 224-2007, Section 142 provides that any ordinance adopted between January 1, 2007 and April 1, 2007, concerning CAGIT, COIT, or CEDIT that was to be effective on July 1, 2007, is to now be effective on October 1, 2007.²⁷⁶

Public Law 224-2007, Section 145 provides that if Monroe County adopts an ordinance to impose the additional COIT authorized, then the tax is to take effect on July 1, 2007, or fifteen days after the DOSR receives a notice that the ordinance was adopted, whichever is later.²⁷⁷

Public Law 224-2007, Section 146 provides that an ordinance adopted before April 29, 2007, by Howard County that provided for a rate that was less than 0.25% is legalized and validated.²⁷⁸

Public Law 218-2007, Section 54 provides that revenue stamps paid for before July 1, 2007, and in the possession of a distributor may be used if the full amount of the tax increase is remitted to the DOSR.²⁷⁹

Public Law 42-2007, Section 20 is retroactive and repeals I.C. § 8-2.1-21 which regulated armored car companies that are now regulated under I.C. § 8-2.1-24-18.²⁸⁰

II. INDIANA TAX COURT DECISIONS

The Tax Court rendered a variety of opinions from January 1, 2007 to December 31, 2007. Specifically, the Tax Court issued eleven published opinions and decisions: six of which concerned the Indiana real property tax, one of which concerned the Indiana inheritance tax, two of which concerned Indiana sales and use tax, one of which concerned the controlled substance excise tax, and one of

272. 2007 Ind. Acts 3089-90.

273. *Id.*

274. 2007 Ind. Acts 2191.

275. 2007 Ind. Acts 978-79.

276. 2007 Ind. Acts 4048.

277. *Id.* at 4050.

278. *Id.* at 4051.

279. 2007 Ind. Acts 3561-62.

280. 2007 Ind. Acts 1198.

which concerned several state and local taxation issues. The Tax Court also issued twenty-three unpublished opinions: twenty of which concerned Indiana real property tax, one of which concerned Indiana personal property tax, and two of which concerned Indiana corporate income tax. A summary of each opinion and decision appears below.

A. Real Property Tax

1. *Westfield Golf Practice Center, LLC v. Washington Township Assessor.*²⁸¹—Westfield Golf Practice Center, LLC (“Westfield”) initiated this action on July 7, 2005, appealing the 2002 assessment of fifteen acres of land it owns in Hamilton County, Indiana, used to operate a commercial driving range.²⁸² The Hamilton County Property Tax Board of Appeals assessed the land at \$403,800, classifying it as “usable undeveloped.”²⁸³ The rate per acre was \$35,100.²⁸⁴ Westfield sought review by the BTR because Westfield thought that the assessment was too high and violated article X, section I of the Indiana Constitution.²⁸⁵ This appeal followed the BTR’s final determination that upheld the assessment.²⁸⁶ Westfield argued that the assessment violated the article X, section I requirement that assessments be uniform and equal, because its property was not assessed the same as comparable Hamilton County properties.²⁸⁷ To support its argument, Westfield provided evidence in the form of property cards for five other driving ranges.²⁸⁸ Westfield, however, “‘duffed’ the proverbial ball.”²⁸⁹ Indiana real property is assessed according to its market value-in-use.²⁹⁰ The focus of this assessment method “is to measure a property’s value using objectively verifiable data.”²⁹¹ “[Market value-in-use] may be thought of as the ask price of property by its owner[.]”²⁹² Assessment guidelines are used, but they are only a starting point for an assessor’s determination of the property’s market value-in-use.²⁹³ While it is required that a uniform and equal rate of assessment be used, uniform *procedures* are not required to arrive at the rate.²⁹⁴ Westfield’s

281. 859 N.E.2d 396 (Ind. Tax Ct. 2007).

282. *Id.* at 396-97.

283. *Id.* at 397.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 398.

290. *Id.* at 399.

291. *Id.*

292. *Id.* at 399 n.2 (alteration in original) (quoting IND. TAX COMM’RS, 2002 REAL PROPERTY ASSESSMENT MANUAL 2 (2002)).

293. *Id.* at 399.

294. *Id.* (citing *State ex rel. Att’y Gen. v. Lake Superior Court*, 820 N.E.2d 1240, 1250 (Ind. 2005)).

sole argument was that the *methodology* used by the assessor was not uniform and equal.²⁹⁵ Westfield failed to offer evidence regarding the property's market value-in-use and the market value-in-use of comparable properties, which resulted in Westfield's failure to prove that its assessment was unconstitutional under article X, section I.²⁹⁶

2. *Methodist Hospitals, Inc. v. Lake County Property Tax Assessment Board of Appeals*.²⁹⁷—Methodist Hospitals (“Methodist”) initiated this action on November 2, 2004, appealing the denial of a charitable purposes exemption for the 2000 tax year for two medical offices it owns and operates.²⁹⁸ Methodist is a nonprofit corporation, which is recognized by the Internal Revenue Service as a 501(c)(3) organization.²⁹⁹ In addition to owning and operating two acute care hospitals, Methodist owns and operates two Primary Care Associates (“PCA”) medical offices.³⁰⁰ These PCA offices are located in Griffith, Indiana and Merrillville, Indiana.³⁰¹ Methodist employees staff PCA and perform many of the administrative functions such as billing and collections.³⁰² PCA offices offer medical services to the general public.³⁰³ Physicians at PCA may admit their patients to Methodist's acute care hospitals, but patients are not sent to PCA from Methodist.³⁰⁴ Methodist applied for a charitable purposes exemption in May 2000 for both PCA sites.³⁰⁵ The application was denied by the Lake County PTABOA and the BTR.³⁰⁶ Methodist argued that PCA qualified for the exemption for three reasons: “(1) because it uses the PCAs to provide traditional medical services, (2) because the PCAs provide medical services as a part of Methodist's ‘overall continuum of care[,]’ and (3) because the PCA physicians do not use the offices ‘for personal gain.’”³⁰⁷ The Tax Court noted that mere ownership of other property by an exempt hospital does not automatically entitle the other property to a charitable purposes exemption.³⁰⁸ To make a *prima facie* case that PCA is entitled to a charitable purposes exemption, Methodist was required to show that PCA was “substantially related to or supportive of

295. *Id.*

296. *Id.*

297. 862 N.E.2d 335 (Ind. Tax. Ct.), *review denied*, 869 N.E.2d 456 (Ind. 2007).

298. *Id.* at 336-37.

299. *Id.* at 336.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 336-37.

307. *Id.* at 339 (alteration in original) (quoting and citing Cert. Admin. R. at 465-66; Oral Argument Transcript at 11, *Methodist Hospitals*, 862 N.E.2d 335; Petitioner's Brief at 7-9, 12-14, *Methodist Hospitals*, 862 N.E.2d 335)).

308. *Id.* at 338.

Methodist's inpatient facilities.”³⁰⁹ The term “inpatient” defined by I.C. § 6-1.1-10-16(h) includes only that portion of the hospital that provides meals and services to admitted patients.³¹⁰ Further, the phrase “substantially related to or supportive of” “means that the other property is associated, to a considerable degree, to a hospital's inpatient facility *or* that the other property provides considerable aid to, or promotes to a considerable degree, the interests of a hospital's inpatient facility.”³¹¹ The evidence provided by Methodist regarding the employment of PCA staff and the administrative functions provided to PCA failed to demonstrate what relationship the inpatient facilities had to PCA and how the interests of the inpatient facilities were promoted by PCA.³¹² In addition, Methodist did not demonstrate how merely offering the services at PCA resulted in PCA being “*substantially* related to or supportive of” the inpatient facilities.³¹³ It “will not [be] presume[d] that a *substantial* relationship or supportive network arises merely because two entities are engaged in the same type of business activity.”³¹⁴ Methodist failed to establish the *prima facie* case and the denial of the charitable purposes exemption for PCA was affirmed.³¹⁵

3. French Lick Township Trustee Assessor v. Kimball International, Inc.³¹⁶—The township assessor initiated an appeal of the BTR's final determination of the value of Kimball's real property in 2002 on April 27, 2006.³¹⁷ The assessment concerned Kimball's vacant industrial plant located in French Lick Township, Orange County, Indiana.³¹⁸ Kimball appealed the original assessment conducted by the assessor, which valued the plant at \$2,912,300, to the Orange County PTABOA claiming the property's market value-in-use was not accurately reflected by the assessment.³¹⁹ The PTABOA ultimately reduced the assessed value to \$2,595,200, but Kimball petitioned the BTR for a further reduction.³²⁰ The BTR further reduced the assessment to \$1,685,000.³²¹ During the administrative hearing, Kimball provided evidence of the property's market value-in-use by presenting an appraisal, along with letters from its realty company that supported a valuation of \$1,685,000.³²² The appraiser used three approaches to estimate the property's value: the cost approach, the income

309. *Id.*

310. *Id.* at 338-39.

311. *Id.* at 339.

312. *Id.*

313. *Id.* (emphasis added).

314. *Id.* at 339-40 (emphasis added).

315. *Id.* at 340.

316. 865 N.E.2d 732 (Ind. Tax Ct. 2007).

317. *Id.* at 734.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 736.

approach, and the sales comparison approach.³²³ The realty company letters which were provided discussed Kimball's 2002 asking price of \$2,500,000 and how the property would be difficult or not possible to sell at that price, as well as Kimball's decision in 2004 to reduce the price.³²⁴ The reliability of the appraisal was questioned at the hearing by the assessor.³²⁵ The BTR agreed with the assessor's concerns about Kimball's application of the income approach, but found the other methods provided the necessary probative evidence of the property's market value-in-use.³²⁶ In contrast, the assessor did not provide any evidence to contradict Kimball's evidence of the property's market value-in-use.³²⁷

The assessor argued the BTR's final determination was not supported by substantial evidence.³²⁸ The assessor asserted that Kimball failed to make a prima facie case, citing Tax Court cases holding a prima facie case was not established because the taxpayer did not provide a thorough presentation of its evidence and because the BTR accepted Kimball's appraisal "at face value" without considering its reliability.³²⁹ However, the cases cited by the assessor are applicable in circumstances when the BTR determines the taxpayer did not establish a prima facie case.³³⁰ For evidence presented to the BTR to be considered probative, taxpayers must ensure the BTR understands the evidence.³³¹ In contrast, BTR's determination that a taxpayer established a prima facie case is not to be overturned unless there has been an abuse of discretion if the BTR understands the evidence and finds it has probative value.³³² Because the assessor challenged the BTR's final determination, the assessor had the burden to demonstrate the determination was invalid.³³³ The assessor did not satisfy this burden.³³⁴ The assessor's evidence was not sufficient to rebut evidence presented by Kimball regarding the property's market value-in-use, and the assessor did not contradict Kimball's evidence with its own market value-in-use evidence.³³⁵ "[A]ssessing officials should be prepared to defend their assessments by providing their own evidence of value at the administrative level, rather than counting on a taxpayer's failure to make a prima facie case."³³⁶ Therefore, the

323. *Id.*

324. *Id.* at 737.

325. *Id.*

326. *Id.* at 738.

327. *Id.*

328. *Id.*

329. *Id.* at 738-39 (citing Petitioner's Brief at 6-7, 13, *French Lick*, 865 N.E.2d 732).

330. *Id.* at 739.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 739 n.13.

BTR's final determination was affirmed.³³⁷

4. *Shoot v. Anderson Township Assessor*.³³⁸—The Shoots initiated an appeal on August 2, 2006, challenging the BTR's dismissal of forty-five property assessment appeals challenging the 2002 assessments for its property located in Madison County, Indiana.³³⁹ The BTR dismissed the appeals on the ground that they were not timely filed.³⁴⁰ The Tax Court agreed with the BTR's determination that the appeals were not timely filed.³⁴¹ The Shoots originally challenged the assessments on approximately seventy parcels of land to the Madison County PTABOA. The PTABOA denied all the appeals and mailed its determination to the Shoots on March 29 or March 30, 2004.³⁴² The BTR claimed the Shoots' appeals were required to be filed with the Madison County Assessor by May 3, 2004, but were not received by the assessor's office until May 6, 2004.³⁴³ The Shoots, on the other hand, contended they delivered the appeals to the assessor's office on May 3, 2004, but did not have a receipt to collaborate this contention.³⁴⁴ The administrative record showed that all of the Shoots' appeals had two file stamps: one that stated the appeals were received May 6, 2004 and another that stated the appeals were received May 28, 2004 and contained the BTR's name.³⁴⁵ The BTR had prima facie evidence the appeals were not filed until May 6, 2004.³⁴⁶ The Shoots had the burden to rebut the evidence of the May 6, 2004 date with probative evidence the appeals were actually filed on May 3, 2004.³⁴⁷ The Shoots provided no probative evidence to support their assertion that the appeals were filed May 3, 2004, and the BTR's final determination was affirmed.³⁴⁸

5. *Lakes of the Four Seasons Property Owners' Ass'n v. Department of Local Government Finance*.³⁴⁹—Lake of the Four Seasons Property Owners' Association, Inc. ("LOFS") initiated this appeal concerning the 2002 real property

337. *Id.* at 739.

338. 868 N.E.2d 79 (Ind. Tax Ct. 2007).

339. *Id.* at 79.

340. *Id.*

341. *Id.* at 82.

342. *Id.* at 79.

343. *Id.* The Indiana Code requires that appeals must be filed with the county assessor within thirty days after the taxpayer receives notice of the PTABOA action. *Id.* at 80 n.1 (citing IND. CODE. ANN. § 6-1.1-15-3(c) (West 2004)). "Because the Shoots received notice of the PTABOA's final determinations through the mail, another three days was added to the thirty-day period." *Id.* (citing 52 IND. ADMIN. CODE § 2-3-1(e) (2004)). The due date fell on a weekend date, so the appeals were not due until the next business day. *Id.* (citing 52 IND. ADMIN. CODE § 2-3-1-(b)).

344. *Id.* at 81.

345. *Id.* at 80-81.

346. *Id.* at 81.

347. *Id.*

348. *Id.* at 81-82.

349. 875 N.E.2d 833 (Ind. Tax Ct. 2007).

assessment of its streets on June 22, 2006.³⁵⁰ LOFS property is a private, gated community that consists of approximately 2500 residences and 26 miles (or 107.6 acres) of streets in Lake County, Indiana.³⁵¹ In 2002, the streets were valued at \$70,290 utilizing the Neighborhood Valuation Form.³⁵² The assessed base rate was reduced from \$6,534.00 per acre to \$650.00 after a 90% negative influence factor was applied.³⁵³ LOFS appealed the assessment to the BTR alleging that the streets should have been valued at zero, because the streets had no value due to the fact they were so encumbered by easements and restrictions.³⁵⁴ The BTR upheld the DLGF assessment.³⁵⁵ LOFS argued the BTR's determination was not supported by substantial evidence, because the BTR ignored the LOFS's evidence that demonstrated the streets had no value.³⁵⁶ During the hearing, LOFS provided evidence that many jurisdictions have acknowledged that a "common area property" can be rendered valueless if it is burdened by too many restrictions, the streets are owned only for the homeowners' benefit, the streets cannot be sold or conveyed to another party, and LOFS pays at least \$200,000 a year to maintain the streets but LOFS cannot charge for use of the streets.³⁵⁷ In contrast, the DLGF argued that LOFS claim that the streets had zero value was merely a conclusory statement and had no merit without an appraisal.³⁵⁸ The Tax Court disagreed with the DLGF and found that LOFS did provide sufficient evidence to support its *prima facie* case that the assessment was incorrect.³⁵⁹ The evidence LOFS provided was objective, factually-based, and supported its opinion that the streets had no value.³⁶⁰ "It is well settled in Indiana that an owner's testimony as to the value of his or her property will carry probative force if it is based upon facts and not speculation."³⁶¹ The DLGF failed to rebut LOFS's evidence.³⁶² Instead of establishing that its assessment was an accurate reflection of the property's market value-in-use, the DLGF merely explained how it computed the assessed value of the property.³⁶³ It could not, therefore, be said that the BTR's final determination was supported by the evidence, and its determination was subsequently reversed.

6. Brothers of Holy Cross, Inc. v. St. Joseph County Property Tax

350. *Id.* at 833-34.

351. *Id.* at 833.

352. *Id.* at 834.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* at 836.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* (citing *Court View Ctr., LLC v. Witt*, 753 N.E.2d 75, 82 (Ind. Ct. App. 2001)).

362. *Id.* at 837.

363. *Id.*

Assessment Board of Appeals.³⁶⁴—The Brothers of Holy Cross, Inc. (“BCH”) initiated this appeal on July 20, 2005, challenging the BTR’s final determination which upheld the St. Joseph County PTABOA decision to only allow a 17% charitable purposes real property tax exemption in 2002 for BCH’s retirement community located in Notre Dame, Indiana.³⁶⁵ BCH was only granted the exemption for its administrative center and the retirement community’s underlying land.³⁶⁶ BCH argued that the BTR’s decision regarding the 2002 exemption was erroneous, because BCH provided probative evidence at the administrative hearing demonstrating that the retirement community was predominately used for a charitable purpose.³⁶⁷ The evidence provided primarily consisted of copies of the community’s “2003-2005 monthly newsletters and activity calendars, summaries of the services and activities offered to the [community] residents, and lists of residents that had utilized some of those services and activities.”³⁶⁸ However, the Tax Court upheld the BTR determination, finding BHC failed to establish that during the year at issue the retirement community was “owned, occupied, and used for a charitable purpose.”³⁶⁹ The evidence was clear regarding the services and activities available to community residents in 2003-2005, but the evidence did not have the requisite probative value for 2002, the year at issue, because the evidence did not establish what activities and services were available to residents during that time period.³⁷⁰ In contrast, much of the evidence established that many of the activities and services BHC claimed demonstrated its charitable purpose were not available until some time after the 2002 tax year.³⁷¹ Thus, the BTR’s final determination was not erroneous.³⁷²

7. *Krooswyk Brothers, LLC v. North Township Assessor*.³⁷³—Krooswyk Brothers, LLC (“Krooswyk”) initiated this appeal of the 2000 assessment of its real property on May 24, 2002.³⁷⁴ Krooswyk’s land is located in Highland, Indiana, and has an improvement on the land that is used as an office/light storage facility.³⁷⁵ The North Township Assessor (“assessor”) used both the General Commercial Mercantile (“GCM”) and the General Commercial Industrial (“GCI”) pricing schedules to value the improvement. Krooswyk appealed the assessment arguing that the GCK model should have been used to price two

364. 878 N.E.2d 548 (Ind. Tax Ct. 2007).

365. *Id.* at 549.

366. *Id.*

367. *Id.* at 550-51.

368. *Id.* at 551 (citing Cert. Admin. R. at 202-317).

369. *Id.* at 553.

370. *Id.* at 552.

371. *Id.*

372. *Id.* at 553.

373. No. 49T10-0205-TA-55, 2007 WL 34903 (Ind. Tax Ct. Jan. 5, 2007) (unpublished table decision).

374. *Id.* at *1.

375. *Id.*

sections of the improvement.³⁷⁶ This appeal follows the BTR's final determination that upheld the assessment.³⁷⁷ The party challenging a final determination of the BTR must submit probative evidence regarding the alleged error in the assessment to make a *prima facie* case.³⁷⁸ The regulations in effect at the time of Krooswyk's assessment explained that the GCK pricing schedule should be used for "valuing preengineered and predesigned pole buildings which are used for commercial and industrial purposes."³⁷⁹ However, the GCK pricing schedule cannot be used for buildings "classified as a special purpose design[.]"³⁸⁰ Even though there is little guidance in the regulation as to when improvements qualify for the GCK schedule, taxpayers have been instructed by the Tax Court that a link must be shown between the components in the taxpayer's improvement and the components listed in the regulation.³⁸¹ Krooswyk first argued that section "D" of its improvement was entitled to GCK pricing, because the improvement contained z-channels, x-bracing, and metal walls.³⁸² In spite of the fact the improvement contained these characteristics, the GCK schedule did not *overall* contemplate a section "D" improvement, and section "D" improvements are not priced under the GCK schedule.³⁸³ The BTR's final determination regarding the section "D" improvement was affirmed.³⁸⁴ Krooswyk also argued that section "E" of its improvement was entitled to the GCK schedule, because the improvement is a pre-engineered Armco building that is finished without heat, contains tapered ceiling beams, z-channels, x-bracing wall girts, and a tapered beam.³⁸⁵ In contrast to the section "D" improvement, the BTR's final determination that the section "E" improvement should not be priced under GCK scheduled was reversed.³⁸⁶ The BTR's determination that Krooswyk's evidence "lack[ed] basic facts" was based on a preference for *different* evidence, not features that would result in disqualification from the GCK pricing schedule.³⁸⁷ By basing the denial on this preference, the BTR did not deal with Krooswyk's evidence in a meaningful manner.³⁸⁸

376. *Id.*

377. *Id.* Krooswyk's administrative hearing was originally conducted with the SBTC on May 17, 2001; however, the BTR issued the final determination, because the legislature abolished the SBTC on December, 31, 2001, and created the BTR as its "successor." *Id.* at *1 & n.2.

378. *Id.* at *1 (citing *Long v. Wayne Twp. Assessor*, 821 N.E.2d 466, 468 (Ind. Tax Ct. 2005)).

379. *Id.* at *2 (quoting 50 IND. ADMIN. CODE § 2.2-10-6.1(a)(1)(D) (1996)).

380. *Id.* (alteration in original) (quoting 50 IND. ADMIN. CODE § 2.2-10-6.1(a)(1)(D)).

381. *Id.*

382. *Id.* at *2-3.

383. *Id.* at *3.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

8. *Coller v. Perry Township Assessor*.³⁸⁹—Coller initiated this action on January 23, 2006, challenging the 2002 assessment of his residential real property located in Monroe County, Indiana.³⁹⁰ In 1995, Coller purchased the property and subsequently completely demolished the existing house on the property and built a new house that measured over 8100 square feet.³⁹¹ The neighborhood where the house is located in Perry Township is considered to be very desirable.³⁹² The Perry Township Assessor (“assessor”) assessed the house at \$1,543,200 and applied a 1.60 neighborhood factor to arrive at that value.³⁹³ This neighborhood factor was applied to the other properties in the surrounding neighborhood as well.³⁹⁴ Coller challenged the assessment with the Monroe County PTABOA on the basis that the assessed value exceeded the property’s replacement cost.³⁹⁵ The PTABOA disagreed and sustained the assessment.³⁹⁶ Coller challenged the PTABOA finding to the BTR claiming that the application of the 1.60 neighborhood factor is what resulted in the property’s assessed value exceeding that of the improvement’s replacement cost.³⁹⁷ This appeal followed the BTR’s final determination that denied Coller relief.³⁹⁸ Coller argued his house should be classified as its own neighborhood and the neighborhood factor applied to this neighborhood should be 1.00 because his property was “‘dramatically newer, bigger, and more expensive’ than the other homes in the surrounding neighborhood.”³⁹⁹ Indiana real property is assessed based on its “true tax value,” which is based on “[t]he market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property[.]”⁴⁰⁰ A taxpayer cannot merely challenge a property assessment based on the misapplication of the regulations, rather evidence that demonstrates the property’s actual market value-in-use is required.⁴⁰¹ Coller’s evidence consisted solely of an affidavit in which he stated the property cost \$956,000 to build in 1995.⁴⁰² This sole piece of evidence provided by Coller, which contained only one sentence, was not sufficient probative evidence regarding the property’s

389. No. 49T10-0601-TA-10, 2007 WL 106491 (Ind. Tax Ct. Jan. 17, 2007) (unpublished table decision).

390. *Id.* at *1.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.* at *3 (quoting Cert. Admin. R. at 84-91).

400. *Id.* at *2 (alteration in original) (quoting 2002 REAL PROPERTY ASSESSMENT MANUAL 2 (2004)).

401. *Id.* at *3.

402. *Id.*

market value-in-use.⁴⁰³ Coller provided no documentation of the construction costs to support the figure in his affidavit nor did he attempt to subsequently explain the figure.⁴⁰⁴ Because Coller did not demonstrate that his property's market value-in-use was not accurately reflected by the assessment, the BTR's final determination was affirmed.⁴⁰⁵

9. *Johnston v. Gerard*.⁴⁰⁶—The Johnstons initiated this action on June 26, 2002, appealing the 1996 and 1997 real property assessments of their apartment complex located in Center Township, Vanderburgh County, Indiana.⁴⁰⁷ The Johnstons claimed that the Center Township Assessor ("assessor") applied the wrong obsolescence depreciation adjustment.⁴⁰⁸ The assessor valued the property at \$452,330 with a 5% obsolescence adjustment.⁴⁰⁹ The Johnstons appealed the Vanderburgh County Board of Review's decision to uphold the 5% obsolescence adjustment to the BTR, which denied the Johnstons' request for a 67.5% obsolescence adjustment.⁴¹⁰ The apartment complex at issue contained a total of thirteen buildings, twelve of which were constructed between 1979 and 1983 and one constructed in 1996.⁴¹¹ It was discovered after the last building was constructed that problems existed with the land beneath the buildings.⁴¹² Prior to the complex's original construction, the property's site was not properly prepared, because the fill used to help lay the buildings' foundations was not properly drained and compacted.⁴¹³ This failure to properly prepare the site resulted in the fill, which was made up of debris, soil, and trees, to decay and rot over time, ultimately resulting in the fill becoming soft and causing the foundations to begin collapsing.⁴¹⁴ During the BTR hearing, the Johnstons provided the following evidence to support their request for the 67.5% adjustment.⁴¹⁵ First, the study and testimony of a geotechnical engineer was presented.⁴¹⁶ The engineer used a standard preparation test, an unconfined compressive strength test, and natural moisture content test to investigate the property.⁴¹⁷ Based on the results of these tests, the engineer testified why the soil was soft and concluded, "[T]he site

403. *Id.* at *4.

404. *Id.*

405. *Id.*

406. No. 82T10-0206-TA-80, 2007 WL 106493 (Ind. Tax Ct. Jan. 17, 2007) (unpublished table decision).

407. *Id.* at *1.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.* at *3.

416. *Id.*

417. *Id.* at *3 & n.2.

[was] properly prepped prior to [the] construction of the buildings.”⁴¹⁸ He concluded that the installation of a “mini-pile” system would be the most economical method to stabilize the property and cure the problem with the complex.⁴¹⁹ Next, the Johnstons also provided evidence of the approximate cost to install a “mini-pile” system with the testimony of an estimator, project manager, and vice-president of a construction company.⁴²⁰ This expert witness testified that a “very conservative” estimate would be \$936,000 to install the system, not including remedial repairs necessary after installation.⁴²¹ The final evidence provided by the Johnstons concerned an appraisal, incorporating both the geotechnical investigation and estimated remedy, conducted by a licensed appraiser in which the appraiser concluded that “the poor site preparation of the property was functional obsolescence, which causes severe physical depreciation, and that ‘[t]he buildings simply [cannot] function as they were designed.’”⁴²² The appraiser also stated that property’s marketability is decreased because of the loss of value caused by the defect and that no one would be willing to buy the property with the defect, and if a person did buy the property, the sale price would have to be reduced to account for the cost to fix the problem.⁴²³ The amount of obsolescence was subsequently quantified by a cost to cure method.⁴²⁴

A taxpayer seeking to make an obsolescence claim must meet the following two-pronged test: 1) the cause of the alleged obsolescence must be identified and 2) the amount of obsolescence to be applied to the improvement(s) must be quantified.⁴²⁵ Both prongs require “a connection to an actual loss in property value.”⁴²⁶ The BTR’s determination that the Johnstons were not entitled to the additional obsolescence depreciation adjustment, because the property’s deficiency was part of the land and thus not functional obsolescence⁴²⁷ was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

418. *Id.* at *3 (alteration in original) (quoting Cert. Admin. R. at 308-09).

419. *Id.*

420. *Id.* at *4.

421. *Id.*

422. *Id.* (alteration in original) (footnote omitted) (quoting Cert. Admin. R. at 177; 333-34).

423. *Id.*

424. *Id.* The 67.5% obsolescence figure was determined by the following method:

[The appraiser] took the cost of the existing improvements as determined by the Marshal and Swift Valuation Handbook (\$1,981,540) less the estimated physical depreciation of all buildings (30%, or \$594,462) to arrive at the value after physical depreciation (\$1,387,078). [The appraiser] then divided [the construction company witness’] estimated cost to cure the functional obsolescence (\$936,000) by the value after physical depreciation (\$1,387,078) to arrive at a 67.5% obsolescence depreciation adjustment.

Id. (citations and footnote omitted) (citing Cert. Admin. R. at 182; 341-42).

425. *Id.* at *2 (citing *Clark v. State Bd. of Tax Comm’rs*, 694 N.E.2d 1230, 1238, 1241 (Ind. Tax Ct. 1998)).

426. *Id.* (citing *Clark*, 694 N.E.2d at 1238).

427. *Id.* at *5.

the law.”⁴²⁸ Indiana’s assessment regulations provide that site preparation is priced as part of a property’s improvement.⁴²⁹ The BTR also should not have ignored the appraiser’s 67.5% quantification simply because it was not computed from a firm quote.⁴³⁰ The appraiser stated that the estimate was “very conservative” and did not even include work that might need to be done after the system was installed.⁴³¹ Therefore, the Johnstons established a prima facie case that their property was entitled to the 67.5% functional depreciation adjustment, and the assessor failed to rebut the Johnstons’ evidence with its own evidence or alternate calculations.⁴³² The BTR’s final determination, therefore, was reversed.⁴³³

10. *Bank of Highland Trust 13-3085 v. Department of Local Government Finance*.⁴³⁴—Bank of Highland Trust 13-3085 (“BOHT”) initiated this appeal on June 2, 2006, appealing its 2002 real property assessments for two commercial parcels located in Lake County, Indiana.⁴³⁵ The two parcels consisted of a 4269 square foot parking lot and a 9500 square lot containing a two-story office building.⁴³⁶ BOHT believed the DLGF’s assessments of the two parcels was too high and appealed the assessments to the BTR, which denied BOHT relief.⁴³⁷ During the BTR hearing, BOHT presented evidence in the form of four property appraisals and two realtor statements regarding the property’s estimated value and asking price.⁴³⁸ The appraisals and statements both valued the property during the following years: 1988, 1990, 1996, 1997, and 2005.⁴³⁹ This documentation valued the property between \$250,000 and \$540,000 during those years.⁴⁴⁰ To overturn a BTR final determination, “the party seeking reversal must have submitted, during the administrative hearing process, probative evidence regarding the alleged assessment error.”⁴⁴¹ Real property in Indiana is assessed

428. *Id.* at *6.

429. *Id.* at *5 (citing 50 IND. ADMIN. CODE 2.2-10-6.1(a)(3)(A) (1996) (repealed 2002)).

430. *Id.* The Tax Court cited *Canal Square Limited Partnership v. State Board of Tax Commissioners*, 694 N.E.2d 801, 805 (Ind. Tax Ct. 1998), for the proposition that the BTR must deal with a taxpayer’s probative evidence in a meaningful manner when it is offered and cannot simply ignore the evidence. *Id.*

431. *Id.*

432. *Id.* at *6.

433. *Id.*

434. No. 49T10-0606-TA-52, 2007 WL 247813 (Ind. Tax Ct. May 18, 2007) (unpublished table decision), *trans. denied*, 869 N.E.2d (Ind. 2007).

435. *Id.* at *1.

436. *Id.*

437. *Id.* The parking lot was assessed at \$33,700 and the lot containing the office building was assessed at \$572,000. *Id.*

438. *Id.* at *2.

439. *Id.*

440. *Id.*

441. *Id.* at *1 (citing *Osolo Twp. Assessor v. Elkhart Maple Lane Assocs.*, 789 N.E.2d 109, 111 (Ind. Tax Ct. 2003)).

based on its “true tax value,” which is determined by the property’s market value-in-use for its current use.⁴⁴² Even if an assessor errs in applying the promulgated guidelines, the assessment is not to be invalidated unless it is an inaccurate reflection of the property’s market value-in-use.⁴⁴³ Therefore, the taxpayer challenging an assessment must provide evidence that the property’s assessed value is not an accurate reflection of its market value-in-use.⁴⁴⁴ BOHT failed to meet its burden because the evidence that BOHT provided did not reflect the property’s market value-in-use as of January 1, 1999.⁴⁴⁵ “Indiana’s assessment regulations provide that a 2002 general assessment is to reflect a property’s market value-in-use as of January 1, 1999.”⁴⁴⁶ Without explaining how the evidence regarding the years presented by BOHT relate to the January 1, 1999 value, the evidence BOHT provided means nothing.⁴⁴⁷ The line graph submitted by BOHT charting the trend of the appraisals and estimates of value is only a “guesstimate” of the property’s 1999 value and does not specify the property’s market value-in-use for January 1, 1999, even if it does indicate a downward trend.⁴⁴⁸ The Tax Court affirmed the BTR’s final determination.⁴⁴⁹

11. *Scherwood Golf Concessions, Inc. v. Department of Local Government Finance*.⁴⁵⁰—*Scherwood Golf Concessions, Inc.* (“Scherwood”) initiated this action on February 21, 2006, appealing the 2002 assessment of two of its parcels which were located in Lake County, Indiana.⁴⁵¹ One of the parcels contained an eighteen hole golf course on forty acres and the other parcel contained a commercial clubhouse and parking lot on 5.85 acres.⁴⁵² Scherwood appealed the DLGF’s assessments of the parcels based on the belief that the assessed values were too high.⁴⁵³ This appeal follows the BTR’s final determination that upheld the DLGF’s assessment.⁴⁵⁴ Scherwood argued that the BTR’s determination was erroneous, because that determination, which was established during the administrative hearing meant that golf courses in the township were not “assessed in a uniform, equal or consistent manner.”⁴⁵⁵ Scherwood’s argument was based on the fact that a nearby “nicer and newer” golf course had a lower assessed

442. *Id.* at *2 (citing 2002 REAL PROPERTY ASSESSMENT MANUAL 2 (2004)).

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.* (citing 2002 REAL PROPERTY ASSESSMENT MANUAL 4 (2004)).

447. *Id.*

448. *Id.* at *3.

449. *Id.*

450. No. 49T10-0602-TA-18, 2007 WL 247809 (Ind. Tax Ct. Jan. 30, 2007) (unpublished table decision).

451. *Id.* at *1.

452. *Id.*

453. *Id.* The golf course was assessed with a total value of \$860,500 and the clubhouse and parking lot were assessed with a total value of \$574,100. *Id.*

454. *Id.*

455. *Id.*

value.⁴⁵⁶ To support its argument, Scherwood provided evidence in the form of property records cards for the “nicer and newer” golf course and the testimony of its attorney representative regarding both of the courses’ characteristics.⁴⁵⁷ No market value-in-use evidence was offered.⁴⁵⁸ Article X, section 1 of the Indiana Constitution “has long been held to require: (1) uniformity and equality in assessment, (2) uniformity and equality as to the rate of taxation, and (3) a just valuation for taxation of all property.”⁴⁵⁹ Prior to 2002, the uniformity and equality of assessments was determined by looking at how the regulations were applied to comparable properties.⁴⁶⁰ However, the Indiana property tax assessment system changed in 2002, and a new system was developed that could objectively determine the true tax value of property through its market value-in-use.⁴⁶¹ Now, there is a presumption that the assessment process accurately measures a property’s market value-in-use.⁴⁶² If a taxpayer offers relevant evidence of the property’s market value-in-use, then this presumption may be rebutted.⁴⁶³ There is no requirement that uniform procedures be used to arrive at a “uniform and equal rate” of assessment.⁴⁶⁴ Scherwood did not provide evidence that its assessment was erroneous or that it was assessed in a “non-uniform manner” with the other township golf courses, because Scherwood did not demonstrate the market value-in-use of its golf course or the comparable golf course.⁴⁶⁵ The BTR’s final determination was affirmed.⁴⁶⁶

12. *Indianapolis Racquet Club, Inc. v. Lawrence Township (Marion County) Assessor*.⁴⁶⁷—Indianapolis Racquet Club, Inc. (“IRC”) initiated three tax appeals on December 12, 2003, appealing the 1989, 1991, and 1995 property assessments of its tennis facility improvement located in Marion County, Indiana.⁴⁶⁸ IRC’s tennis facility consisted of eight indoor tennis courts.⁴⁶⁹ IRC’s tennis facility was assessed during the years at issue with the General Commercial Industrial (“GCI”) light warehouse cost schedule and the forty-year life expectancy table by the Lawrence Township Assessor (“assessor”).⁴⁷⁰ This appeal followed the

456. *Id.*

457. *Id.* at *2.

458. *Id.*

459. *Id.* (citing *Indianapolis Historic Partners v. State Bd. of Tax Comm’rs*, 694 N.E.2d 1224, 1228 (Ind. Tax Ct. 1998)).

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.* at *3.

465. *Id.*

466. *Id.*

467. No. 49T10-0312-TA-59, 2007 WL 772936 (Ind. Tax Ct. Mar. 15, 2007) (unpublished table decision).

468. *Id.* at *1.

469. *Id.*

470. *Id.*

BTR's determination that upheld the assessment.⁴⁷¹ "IRC maintain[ed] that it [was] entitled to: 1) a grade factor reduction equivalent to 50% of the tennis facility's reproduction cost for the 1989 tax year; 2) a kit building adjustment for the 1991 tax year; and 3) application of the [general commercial kit] cost schedule for the 1995 tax year,"⁴⁷² because it "prima facie established that its tennis facility is a light, pre-engineered building that qualified as a kit building."⁴⁷³ The Tax Court consolidated the several issues raised by IRC into one issue: whether or not IRC's tennis facility is eligible for a reduction in its property's assessed value for the years at issue because the improvement is a light, pre-engineered building.⁴⁷⁴ To support its argument, IRC's president presented evidence in the forms of oral and written testimony and photographs demonstrating the characteristics of the building.⁴⁷⁵ The evidence IRC provided "demonstrate[d] that the tennis facility's columns, roof supports, and other features are consistent with the features that qualify light, pre-engineered buildings for the kit building adjustment."⁴⁷⁶ In contrast, the evidence that the assessor provided, which the BTR used to support its holding that the building was something other than an economical kit building, only pointed to features that would not necessarily disqualify the improvement for the kit building qualification, such as the fact that the facility had a block concrete foundation, two of the walls were concrete block or brick, and the roof pitch was well above what is seen in a typical kit building.⁴⁷⁷ "[A]ssessing officials must quantify the effect of the subject improvement's deviations from the basic kit model in order

471. *Id.*

472. *Id.* at *3.

473. *Id.*

474. *Id.* at *1.

475. *Id.* at *3. The photographs showed the following building attributes:

- (1) a rigid beam steel framing system; (2) cold form open "Z" channels; (3) two "H" columns; (4) "X" bracing; (5) 26-28 gauge metal sidewalls and roof; (6) 14-16 gauge steel purlins and girders; (7) a 120' width; (8) a 20' eave height; (9) 25' uniform bay spacing between its rigid frame components; (10) no concrete floor; (11) no load bearing walls or interior poles; (12) no columns or roof beams; (13) no foundation, and (14) a three row, concrete block sealant surrounding its perimeter.

Id. (citing 1989 Cert Admin R. at 33-42, 399-416; 1991 Cert. Admin R. at 33-42, 393-410; 1993 Cert. Admin R. at 32-41, 397-414).

476. *Id.* (citing *Hamstra Builders, Inc. v. Dep't of Local Gov't Fin.*, 783 N.E.2d 387, 390-91 (Ind. Tax Ct. 2003)). The property tax assessment regulations were amended in 1995 to include a General Commercial Kit ("GCK") cost schedule for valuing kit buildings, but the regulations do not provide much detail concerning what constitutes the essential characteristics of a kit building. *Id.* at *2. Therefore, even though Instructional Bulletin 91-8 was issued prior to the new regulations, it continues to offer valuable guidance in determining when a building may be assessed under the GCK schedule, because the bulletin provides information concerning the types of light, pre-engineered buildings that qualify for a kit adjustment. *Id.*

477. *Id.* at *3 (citing 1989 Cert. Admin. R.; 1991 Cert. Admin. R.; 1995 Cert. Admin. R.).

to determine whether those deviations rendered it no longer economical.”⁴⁷⁸ The Tax Court determined that the BTR’s final determination was not “supported by substantial evidence,” and therefore, the Tax Court reversed the BTR’s final determination, because the assessor did not rebut the *prima facie* case which IRC established.⁴⁷⁹

13. *Caldwell v. Department of Local Government Finance*.⁴⁸⁰—Caldwell initiated this original tax appeal on April 17, 2006, to challenge the DLGF’s denial of its October 2005 objection to the Union County/College Corner Joint School District’s (“School District”) 2006 budget.⁴⁸¹ The School District fixed its 2006 budget in September 2005 after the requisite public hearings.⁴⁸² Union County taxpayers were informed of the proposed tax rates necessary to fund the School District’s budget by the county auditor through public notice.⁴⁸³ Caldwell objected to the tax rate increase.⁴⁸⁴ On appeal, Caldwell argued the proposed tax rates were unfairly burdensome to the county taxpayers and that there should not be levies for the School District to “1) provide health insurance benefits to its school board members; and 2) make payments on its [guaranteed energy savings account] from the capital projects fund.”⁴⁸⁵ The Tax Court first considered the health insurance issue. Caldwell argued that school board members should not be provided health insurance benefits because I.C. § 20-26-4-7 limits annual compensation for school board members to \$2000 per year plus a per diem.⁴⁸⁶ The Tax Court rejected this argument and affirmed the DLGF’s final determination regarding this issue.⁴⁸⁷ The crucial consideration was the definition of the word “compensation.” Caldwell’s argument was “based on the premise that the term ‘compensation’ includes *both* ‘salary’ and ‘fringe benefits.’”⁴⁸⁸ While “salary” and “fringe benefits” can be considered categories or types of compensation, legislative intent revealed when reviewing the whole statute that the term “compensation” in I.C. § 20-26-4-7 was meant to have a more restricted meaning.⁴⁸⁹ The language of the statute, which defines “compensation” as “‘a reasonable amount for service . . . not to exceed . . . \$2,000[] per year[] and [] a per diem,’”⁴⁹⁰ leads to the conclusion that the statute was only referring to

478. *Id.* (citing *Barker v. State Bd. of Tax Comm’rs*, 712 N.E.2d 563, 571 (Ind. Tax Ct. 1999)).

479. *Id.* at *4.

480. No. 49T10-0604-TA-41, 2007 WL 731336 (Ind. Tax Ct. Mar. 12, 2007) (unpublished table decision).

481. *Id.* at *1.

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.* at *3.

488. *Id.* at *2 (emphasis added).

489. *Id.* at *2-3.

490. *Id.* at *3 (quoting IND. CODE ANN. § 20-26-4-7 (West 2005)).

“salary” because the amount is fixed and is paid at stated intervals and because there is a relation between the time worked or service provided.⁴⁹¹ In contrast, providing health insurance is a “fringe benefit.”⁴⁹² Fringe benefits are a distinct form of compensation, separate from and supplemental to salary.⁴⁹³ The School District did not violate Indiana law when it paid a portion of the school board members’ health insurance premiums because salary does not include fringe benefits.⁴⁹⁴

Next, the Tax Court considered the issue regarding the School District’s use of its capital funds project for payment on its government energy savings account (“GESC”).⁴⁹⁵ The School District had two contracts with Honeywell for energy saving projects.⁴⁹⁶ One of the contracts covered a five-year period, and the other contract covered a ten-year period, but the two were eventually combined sometime between October 2000 and January 2002.⁴⁹⁷ Caldwell stated the remaining contract had “approximately eight [more] years at \$46,880 per year[.]”⁴⁹⁸ Caldwell argued the School District should be “punished” for not having to date any documentation regarding the savings resulting from GESC, because at the end of the contract term there would be no method to determine whether Honeywell was required to reimburse the School District.⁴⁹⁹ The “punishment” suggested by Caldwell was to require the School District to make any remaining GESC payments to Honeywell from the general fund instead of the capital projects fund.⁵⁰⁰ The Tax Court disagreed with Caldwell’s request for “punishment,” because the Tax Court determined that “the School District has done nothing yet for which it should be punished.”⁵⁰¹ When a School District’s

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.* The Tax Court described a GESC as follows:

Essentially, a GESC is a method by which a school corporation can finance the implementation of certain conservation energy methods. More specifically, a school corporation contracts with a “qualified provider” to make some type of facility alteration or technological upgrade designed to reduce the school’s energy, water, wastewater, or other operating costs. As part of the contract, however, the qualified provider must make two “guarantees.” First, it must guarantee that the savings resulting from the conservation measures (“guaranteed savings”) will cover the costs of implementing those measures. Second, the qualified provider must guarantee that if the actual savings resulting from the conservation measures are less than the guaranteed savings, it will reimburse the school corporation for the difference.

Id. (citations and footnotes omitted).

496. *Id.* at *4.

497. *Id.*

498. *Id.* (quoting Petitioner’s Brief at 2, *Caldwell*, 2007 WL 731336).

499. *Id.*

500. *Id.*

501. *Id.* at *4-5.

actual savings from a GESC are less than the savings guaranteed, the School District can be reimbursed by the qualified provider pursuant to I.C. § 36-1-12.5-5.⁵⁰² However, the *entire* contract term must expire before such a determination can be made.⁵⁰³ Because the School District's GESC contract term had not yet expired, the School District was not yet required to document actual savings during the GESC term.⁵⁰⁴ Therefore, the DLGF's final determination rejecting Caldwell's request for "punishment" was affirmed.⁵⁰⁵

14. *Beta Steel Corp. v. Scott*.⁵⁰⁶—Beta Steel Corporation ("BSC") initiated this action on November 1, 2002, appealing the denial of an obsolescence adjustment for the 1999 assessment year.⁵⁰⁷ BSC is an Indiana corporation that "owns and operates a steel manufacturing plant located in Porter County, Indiana."⁵⁰⁸ The plant's primary facility was the manufacturing facility, constructed in the early 1990s which housed a hot rolling mill.⁵⁰⁹ This primary facility was expanded in 1995 when an electric arc furnace and various satellite buildings were added.⁵¹⁰ BSC's plant was valued at \$5,474,270 by the Portage Township Assessor ("assessor"), and no obsolescence adjustment was assigned to the facility.⁵¹¹ BSC's requests for an obsolescence adjustment were denied by the Porter County PTABOA and the BTR.⁵¹² During the administrative hearing, BSC argued that BSC was entitled to a 75% obsolescence adjustment for both economic and functional obsolescence present in its primary facility.⁵¹³ BSC believed that BSC was entitled to a functional obsolescence adjustment, because the primary facility had been "designed to accommodate 'obsolete' production equipment and it was overbuilt."⁵¹⁴ BSC also believed that economic obsolescence was present, because "'the U.S. [steel] market' has been negatively affected by foreign steel imports, technological advances, the Clean Air Act, and the fact that 'newer [steel] mills are built with shorter life spans[.]'"⁵¹⁵ To establish a *prima facie* case for its requested obsolescence adjustment, BSC provided evidence in the form of an Obsolescence Analysis that had been

502. *Id.* at *4 (citing IND. CODE ANN. § 36-1-12.5-5(d)(2)(B) (West 2005)).

503. *Id.* (citing IND. CODE ANN. § 36-1-12.5-5(d)(2)(B)).

504. *Id.* at *5.

505. *Id.*

506. No. 71T10-0211-TA-127, 2007 WL 778863 (Ind. Tax Ct. Mar. 16, 2007) (unpublished table decision).

507. *Id.* at *1.

508. *Id.* (footnote omitted).

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.* at *3 (footnotes omitted) (alteration in original) (citing Cert. Admin. R. at 606, 608, 616-18).

515. *Id.* (internal quotation marks omitted) (alteration in original) (quoting Cert. Admin. R. at 331, 662-65).

presented by a certified Member of the Appraisal Institute.⁵¹⁶ The analysis showed the 75% figure was computed by comparing the sales prices and replacement costs of six other steel manufacturing plants located outside Indiana, all of which had been sold within the past eight years.⁵¹⁷ The amount of obsolescence in those six facilities was attributed to the differences between the sales prices and replacement costs.⁵¹⁸ The appraiser's conclusion was that BSC's property had 75% obsolescence, because the range of obsolescence in those six facilities was between 62.03% and 87.8%.⁵¹⁹ This evidence, however, failed to prima facie establish BSC was entitled to an obsolescence adjustment.⁵²⁰ Indiana real property is assessed based on its "true tax value."⁵²¹ During the year at issue, 1999, "a property's true tax value was not its fair market value, but rather the value as determined under Indiana's assessment regulations."⁵²² Additionally, the assessment regulations in 1999 defined obsolescence as either a property's functional or economic loss of value.⁵²³ To obtain an obsolescence adjustment, a taxpayer must first identify the obsolescence causes and then quantify the obsolescence amount, connecting both "to an *actual* loss of value to its property."⁵²⁴ If the obsolescence is quantified using a comparable sales approach, then similar forms of functional obsolescence should exist in the comparable properties.⁵²⁵ However, BSC did not demonstrate the comparable facilities had similar obsolescence causes.⁵²⁶ Further, BSC did not even "attempt to identify what kind(s) of obsolescence caused six other facilities to lose value."⁵²⁷ Instead, BSC's analysis was based on the *assumption* that obsolescence caused the discrepancies in sales prices and replacement costs.⁵²⁸ Not only did BSC fail to demonstrate its facility experienced a loss in value similar to the reasons the other facilities experienced this loss, but BSC also failed to demonstrate its facility could be compared to the other facilities.⁵²⁹ BSC failed to establish comparability with its assertions that similarities existed between its facility and the others, because all of the facilities were used to manufacture steel and one of the facilities was similarly constructed.⁵³⁰ Because BSC did not establish a prima facie case

516. *Id.*517. *Id.*518. *Id.*519. *Id.*520. *Id.*521. *Id.* at *2 (citing IND. CODE ANN. § 6-1.1-31-6(c) (West 2007)).522. *Id.* (citing IND. CODE ANN. § 6-1.1-31-6(c) (West 1999)).523. *Id.* (citing IND. ADMIN. CODE § 2.2-10-7(e) (1996) (repealed 2002)).524. *Id.* "In other words, the taxpayer *must show* how these factors are causing an *actual* loss of value to its property." *Id.*525. *Id.* at *3 (citing Cert. Admin. R. at 49).526. *Id.*527. *Id.*528. *Id.*529. *Id.* at *3-4.530. *Id.* at *4.

for its requested obsolescence adjustment, the BTR's final determination was affirmed.⁵³¹

15. Washington Township Assessor (Washington County, Indiana) v. Kimball International, Inc.⁵³²—The Washington Township Assessor ("assessor") initiated this action on April 27, 2006, appealing the BTR's final determination which reduced Kimball International's ("Kimball") 2002 real property assessment from \$8,004,000 to \$4,500,000.⁵³³ Kimball's real property consisted of an industrial plant located in Washington County, Indiana.⁵³⁴ Kimball appealed the 2002 assessment to the Washington County PTABOA, claiming the incorrect amount of accrued depreciation had been applied to the improvements resulting in an inaccurate reflection of the property's market value-in-use.⁵³⁵ The PTABOA denied Kimball's request, and Kimball subsequently appealed the decision to the BTR.⁵³⁶ To support its claim, Kimball presented evidence at the BTR hearing of the property's market value-in-use in the form of both a cost approach analysis and a sales comparison analysis.⁵³⁷ The true tax value of the property was computed under the cost approach "by reducing the replacement cost new of the improvements (RCN), as determined by the Assessor, by the improvements' accrued depreciation."⁵³⁸ Depreciation was computed based on calculations of depreciation from eleven properties that were alleged to be comparable and were sold between 1996 and 2002.⁵³⁹ The sales comparison analysis used the same comparable properties.⁵⁴⁰ This method accounted for the differences between the comparable properties and Kimball's property through the adjustment of the sales prices, as well as the sales prices were adjusted to their 1999 values based on the Consumer Price Index.⁵⁴¹ The two approaches were then compared and reconciled, which resulted in a final estimate of Kimball's property.⁵⁴² The assessor argued the BTR's final determination was not supported by substantial evidence due to Kimball's failure to make a prima facie case, "because Kimball did not properly explain/establish the comparability of the properties used in its cost and sales comparison approaches, nor did it establish the validity of its accrued depreciation calculation."⁵⁴³ However, the assessor

531. *Id.*

532. No. 49T10-0604-TA-43, 2007 WL 1289623 (Ind. Tax Ct. May 3, 2007) (unpublished table decision).

533. *Id.* at *1.

534. *Id.*

535. *Id.*

536. *Id.*

537. *Id.* at *2.

538. *Id.*

539. *Id.*

540. *Id.*

541. *Id.* at *3.

542. *Id.*

543. *Id.* (citing Petitioner's Brief at 4-8, *Kimball Int'l*, 2007 WL 1289623).

failed to meet its burden and the BTR's final determination was affirmed.⁵⁴⁴ The Tax Court noted that a BTR determination that a taxpayer established a prima facie case will not typically be overturned unless it finds an abuse of discretion.⁵⁴⁵ The assessor presented claims during its rebuttal at the administrative hearing, but never substantiated those claims.⁵⁴⁶ The assessor only challenged Kimball's evidence without offering any contradictory market value-in-use evidence.⁵⁴⁷ Further, the assessor did rebut the calculations Kimball presented.⁵⁴⁸ "Here, the Assessor has done nothing more than raise open-ended questions concerning Kimball's evidence."⁵⁴⁹ The assessor bore the burden of demonstrating the invalidity of the BTR's final determination as the party challenging the determination.⁵⁵⁰

16. The Pedcor Investments Cases.⁵⁵¹—The Pedcor Investments cases consisted of four separately issued unpublished opinions, all of which were issued on the same day and all of which addressed the following issue: the BTR's denial of Pedcor Investments' ("Pedcor") claim for an obsolescence depreciation adjustment for its low-income housing projects.⁵⁵² In all of the cases, Pedcor argued that Pedcor presented its prima facie case during the administrative hearings, and because the township assessors did not rebut Pedcor's evidence, the BTR's determinations were invalid because the determinations were not supported by substantial evidence.⁵⁵³ Further, in all of the cases, Pedcor claimed that Pedcor was entitled to economic obsolescence adjustments for the apartment complexes, because the rental restrictions had a negative impact on the complexes' ability to generate income.⁵⁵⁴

Pedcor initiated the action in *Pedcor I* on June 4, 2002, appealing the

544. *Id.* at *4.

545. *Id.*

546. *Id.* at *3.

547. *Id.* at *4.

548. *Id.*

549. *Id.* (citing Petitioner's Brief, *Kimball Int'l*, 2007 WL 1289623).

550. *Id.*

551. *Pedcor Invs.-1990-XIII, L.P. v. Franklin Twp. Assessor (Pedcor I)*, No. 49T10-0206-TA-64, 2007 WL 1364424 (Ind. Tax Ct. May 9, 2007) (unpublished table decision); *Pedcor Invs.-1994-XVII, L.P. v. Portage Twp. Assessor (Pedcor II)*, No. 49A10-0206-TA-65, 2007 WL 1364426 (Ind. Tax Ct. May 9, 2007) (unpublished table decision); *Pedcor Invs.-1995-XXIII, L.P. v. Portage Twp. Assessor (Pedcor III)*, No. 49T10-0206-TA-66, 2007 WL 1364425 (Ind. Tax Ct. May 9, 2007) (unpublished table decision); *Pedcor Invs.-1996-XXV, L.P. v. Jackson Twp. Assessor (Pedcor IV)*, No. 49T10-0205-TA-56, 2007 WL 1364449 (Ind. Tax. Ct. May 9, 2007) (unpublished table decision).

552. *Pedcor I*, 2007 WL 1364424, at *1; *Pedcor II*, 2007 WL 1364426, at *1; *Pedcor III*, 2007 WL 1364425, at *1; *Pedcor IV*, 2007 WL 1364449, at *1.

553. *Pedcor I*, 2007 WL 1364424, at *2; *Pedcor II*, 2007 1364426, at *2; *Pedcor III*, 2007 WL 1364425, at *2; *Pedcor IV*, 2007 WL1364449, at *2.

554. *Pedcor I*, 2007 WL 1364424, at *3; *Pedcor II*, 2007 WL 1364426, at *3; *Pedcor III*, 2007 WL 1364425, at *3; *Pedcor IV*, 2007 WL 1364449, at *3.

assessment of its apartment complex located in Franklin, Indiana, for the March 1, 1995, 1996, and 1997 assessment dates.⁵⁵⁵ The apartment complex at issue was the Lakeview Apartments, which consisted of two phases.⁵⁵⁶ Phase I contained 160 apartments, a portion of which were low-income housing, and Phase II contained sixty-four apartments, all of which were low-income housing.⁵⁵⁷ The low-income housing portions qualified for federal tax credits under the Low Income Housing Tax Credit Program ("LIHTC program").⁵⁵⁸ During the administrative hearing, one of Pedcor's vice-presidents presented evidence of the differences in rents for the rent-restricted and non-restricted apartments.⁵⁵⁹ Pedcor attempted to demonstrate how the loss of income was translated into an obsolescence adjustment.⁵⁶⁰ Pedcor submitted a three-page worksheet used to quantify the obsolescence adjustment for Phase I for the 1995 tax year and stated the quantifications were "made pursuant to 'generally accepted appraisal methods.'"⁵⁶¹ The Tax Court disagreed that the BTR improperly denied Pedcor's request for relief.⁵⁶² At the administrative level, a taxpayer makes a prima facie case for obsolescence when the taxpayer "1) identifies the causes of obsolescence from which its property suffers and 2) quantifies the amount of obsolescence to which it believes it is entitled."⁵⁶³ Probative evidence is required to demonstrate

555. *Pedcor I*, 2007 WL 1364424, at *1.

556. *Id.*

557. *Id.*

558. *Id.* This federal tax credit can be found at 26 U.S.C.A. § 42 (West 2005). *Id.* at *1 & n.1. "The LIHTC Program authorizes individual states to issue federal income tax credits to developers as an incentive for the acquisition, rehabilitation, or new construction of affordable rental housing." *Id.* at *1 & n.1.

559. *Id.* at *3.

560. *Id.*

561. *Id.* at *3-4 (footnote omitted) (quoting Cert. Admin. R. at 1555). The worksheet showed the 3.49% obsolescence adjustment for the 1995 tax year as arrived after the vice-president:

- 1) multiplied the difference in rental income between the non rent-restricted apartments in Phase I and the rent-restricted apartments in Phase I by the total number of rent-restricted units in Phase I to arrive at an annual rent loss of \$56,670;
- 2) reduced the annual rent loss of \$56,670 to \$51,414 to account for a "standard industry" vacancy of 5% and a management fee of 4.5%;
- 3) converted the annual rent loss of \$51,414 to "a present value" of \$589,729 by applying a "10.5[% capitalization rate] for the entire [thirty year] period;"
- 4) reduced the \$589,729 by \$392,897 (Hougland's valuation of the unused tax credits) to arrive at an obsolescence figure for the 199[sic] assessment year of \$196,832; and then
- 5) divided the \$196,832 by \$5,635,019 (Hougland's "estimated appraised value" of the property) to arrive at an obsolescence adjustment of 3.49% for the 1995 assessment year.

Id. (alterations in original) (footnotes omitted) (quoting Cert. Admin R. at 408-10).

562. *Id.* at *3.

563. *Id.* at *2 (citing *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230, 1238 (Ind. Tax Ct.

how the property lost its value due to the alleged obsolescence causes,⁵⁶⁴ and generally recognized appraisal methods are required when an improvement's market value is calculated and obsolescence is converted into a percentage.⁵⁶⁵ Pedcor's evidence merely consisted of conclusory statements, which are not considered probative evidence.⁵⁶⁶ When Pedcor presented its calculations, Pedcor did not explain every element of the analysis.⁵⁶⁷ Additionally, Pedcor did not lay a foundation to support the assertion that the method used was really pursuant to generally accepted appraisal methods, something that Pedcor was required to do.⁵⁶⁸ Failure to lay this foundation resulted in Pedcor's assertion being a conclusory statement.⁵⁶⁹ Pedcor also failed to explain how it arrived at a present value of 10.5% for the rent loss or how the capitalization rate was derived.⁵⁷⁰ Therefore, these statements were merely conclusory statements.⁵⁷¹ Based on the entire administrative record, it could not be said that it was error for the BTR to deny Pedcor's requests for obsolescence adjustments for the apartment complex for the 1995, 1996, and 1997 tax years.⁵⁷²

Pedcor initiated the action in *Pedcor II* on June 4, 2002, appealing the March 1, 1998 assessment of Phase II of its apartment complex located in Portage, Indiana.⁵⁷³ Phase II of the apartment complex at issue, Port Crossing, contained a portion of low-income housing subject to the LIHTC program.⁵⁷⁴ Pedcor claimed that the complex was entitled to a 28.28% obsolescence adjustment.⁵⁷⁵ Pedcor calculated this percentage by "averaging the amount of obsolescence it asserts is present in the property from 1998 through 2027."⁵⁷⁶ According to Pedcor's testimony, the obsolescence for these years was averaged throughout the deed restriction term so that it would not have to come to an administrative hearing every year.⁵⁷⁷ However, in using this "easier" method, Pedcor "failed to provide a quantification that complied with the rule of law."⁵⁷⁸ Indiana bases its

1998)).

564. *Id.* (citing *Miller Structures, Inc. v. State Bd. of Tax Comm'rs*, 748 N.E.2d 943, 953-54 (Ind. Tax Ct. 2001)).

565. *Id.* (citing *Clark*, 694 N.E.2d at 1242 n.18).

566. *Id.* at *4-5.

567. *Id.* at *4.

568. *Id.*

569. *Id.*

570. *Id.* at *4-5. "Indeed, without knowing *how* the number was derived, one cannot determine, at the very minimum, if Pedcor's 'math' is correct." *Id.* at *4 n.11.

571. *Id.*

572. *Id.* at *5.

573. *Pedcor II*, No. 49A10-0206-TA-65, 2007 WL 1364426, at *1 (Ind. Tax Ct. May 9, 2007).

574. *Id.*

575. *Id.* at *3.

576. *Id.* (footnote omitted) (citing Cert. Admin R. at 410).

577. *Id.* (citing Cert. Admin R. at 576).

578. *Id.*

assessments on the property's condition on the *assessment date*.⁵⁷⁹ The use of this average failed to provide an accurate reflection of the Phase II's obsolescence as of the March 1, 1998 assessment date.⁵⁸⁰ However, even if Pedcor's method were used, no obsolescence would be found because the tax credits received for 1998 outweighed Pedcor's loss of income due to the rental restrictions.⁵⁸¹ Based on the record's entirety, the BTR's final determination was supported by substantial evidence.⁵⁸²

Pedcor initiated a separate action on June 4, 2002, in *Pedcor III* to appeal the March 1, 1998 assessment of Phase III of the Port Crossing apartment complex.⁵⁸³ Like Phase II, Phase III contained a portion of low-income housing subject to tax credits under the LIHTC program.⁵⁸⁴ The evidence Pedcor presented to support its obsolescence calculation of 17.19% in a three-page worksheet involved the same methodology Pedcor used to quantify obsolescence for the Lakeview Apartments in *Pedcor I*.⁵⁸⁵ The Tax Court did not address Pedcor's attempt to quantify the applicable obsolescence based on an average of obsolescence computed for future years because of its rejection of this methodology in *Pedcor II*, discussed *supra*, and *Pedcor IV*, discussed *infra*.⁵⁸⁶ Additionally, for the same reasons stated in *Pedcor I*, the Tax Court found the BTR properly rejected Pedcor's obsolescence adjustment claim.⁵⁸⁷ The evidence was not probative, because the evidence consisted only of conclusory statements due to Pedcor's failure to explain every element of its analysis, lay a foundation regarding the obsolescence quantification methodology utilized, or explain the present value calculation or capitalization rate.⁵⁸⁸

Lastly, Pedcor initiated the action involved in *Pedcor IV* on May 30, 2002, appealing the March 1, 1998 assessment of an apartment complex located in Seymour, Indiana.⁵⁸⁹ The apartment complex, Sycamore Springs, consisted of two phases.⁵⁹⁰ Phase I was designed as low-income housing under the LIHTC program and was completed in early 1998, while Phase II was not low-income housing.⁵⁹¹ Pedcor claimed the complex was entitled to a 30.39% obsolescence adjustment based on an average derived by determining the amount of

579. *Id.* (citing *Pedcor Invs.-1990-XIII, L.P. v. State Bd. of Tax Comm'rs*, 715 N.E.2d 432, 435 n.5 (Ind. Tax Ct. 1999)).

580. *Id.*

581. *Id.*

582. *Id.*

583. *Pedcor III*, No. 49T10-0206-TA-66, 2007 WL 1364425, at *1 (Ind. Tax Ct. May 9, 2007).

584. *Id.* at *1.

585. *Id.* at *3-4.

586. *Id.* at *4 n.7.

587. *Id.* at *4-5.

588. *Id.*

589. *Pedcor IV*, No. 49T10-0205-TA-56, 2007 WL 1364449, at *1 (Ind. Tax Ct. May 9, 2007).

590. *Id.* at *1.

591. *Id.*

obsolescence present in the complex from 1999 through 2009, which would be the “tax credit period.”⁵⁹² This same quantification method was rejected by the Tax Court in *Pedcor I*, and the method was rejected again for the same reasons by the Tax Court in this case.⁵⁹³ This method does not accurately reflect the complex’s obsolescence as of the March 1, 1998 assessment date, which is required by Indiana law.⁵⁹⁴ Again, “[i]n its effort to make things easier for itself . . . Pedcor failed to provide a quantification that complied with the rule of law.”⁵⁹⁵ Therefore, the BTR’s final determination was supported by substantial evidence, and the BTR did not err when it denied Pedcor’s request for an obsolescence adjustment.⁵⁹⁶

17. *United Ancient Order of Druids-Grove #29 v. Wayne County Property Tax Assessment Board of Appeals*.⁵⁹⁷—The United Ancient Order of Druids-Grove #29 (“UAOD”) initiated this action on May 24, 2004, appealing the denial of its request for a 2002 property tax exemption as a fraternal beneficiary association under I.C. § 6-1.1-10-23.⁵⁹⁸ UAOD “is an Indiana not-for-profit corporation that owns real and personal property in Richmond, Indiana.”⁵⁹⁹ The Richmond property is used for charitable fundraising, as well as to provide its members with meals and private social events.⁶⁰⁰ In April 2002, UAOD filed a property tax exemption with the Wayne County PTABOA, which was subsequently denied.⁶⁰¹ UAOD appealed this decision to the BTR which also denied the request.⁶⁰² In this appeal, UAOD challenged the BTR’s conclusion that the organization did not have a representative form of government because neither a supreme governing body nor a board of directors elected the

592. *Id.* at *3.

593. *Id.*

594. *Id.* (citing *Pedcor Investments-1990-XIII, L.P. v. State Bd. of Tax Comm’rs*, 715 N.E.2d 432, 435 n.5 (Ind. Tax Ct. 1999)).

595. *Id.*

596. *Id.* at *4.

597. No. 49T10-0406-TA-25, 2007 WL 1439560 (Ind. Tax Ct. May 17, 2007) (unpublished table decision).

598. *Id.* at *1.

599. *Id.* According to the organization’s Articles of Incorporation, its purpose is:

“[t]o unite men together irrespective of nation, tongue or creed, for mutual protection and improvement, to assist socially and materially by timely counsel and instructive lessons, by encouragement of business, by assistance to obtain employment when in need; to foster among its members the spirit of fraternity and good fellowship, and by a well regulated system of dues and benefits, to provide for the relief of the sick and destitute, the burial of the dead and the protection of the widows and orphans of its deceased members.”

Id. (quoting Cert. Admin. R. at 65).

600. *Id.* Examples of the private social events include card games, dances, bingo, and pool tournaments. *Id.*

601. *Id.*

602. *Id.*

organization's officers, rather the officers were elected by local members, and officer positions were not exclusive to benefit members.⁶⁰³ UAOD argued that UAOD had a representative form of government because "the General Assembly could not have intended to disqualify a fraternal organization because its local officers are directly elected by the local members," and it provided evidence during the administrative hearing that social members could not hold officer positions.⁶⁰⁴ The Tax Court rejected these assertions, and the BTR's final determination was affirmed.⁶⁰⁵ The legislature's intent is clear and unambiguous in I.C. § 27-11-2-2(2).⁶⁰⁶ The statute specifically provides that for a fraternal beneficiary association to have a representative form of government, the association's officers must either be elected by the supreme governing body or the board of directors.⁶⁰⁷ UAOD conceded officers are elected by local members.⁶⁰⁸ This concession proves UAOD does not have a representative form of government as required by the statute.⁶⁰⁹ Further, UAOD argued that social members could not be officers, but evidence regarding this argument was not found in the administrative record, and UAOD did not provide direction to the evidence's location.⁶¹⁰ Because UAOD did not have a representative government, it did not meet the requirements of a "fraternal beneficiary association," and thus, UAOD did not qualify for the fraternal beneficiary association exemption under I.C. § 6-1.1-10-23.⁶¹¹

18. *HCPI Indiana, LLC v. Hamilton County Property Tax Assessment Board of Appeals*.⁶¹²—*HCPI Indiana, LLC* ("HCPI"), a foreign limited liability

603. *Id.* at *2. A representative form of government is just one requirement an association must meet in order to be considered a "fraternal beneficiary association" under I.C. § 27-11-1-1. *Id.* The statute defines "fraternal beneficiary organization" as:

- 1) any incorporated society, order, or supreme lodge without capital stock, whether incorporated or not,
- 2) [that is] conducted solely for the benefit of its members and their beneficiaries, and [is]
- 3) not-for-profit,
- 4) operated on a lodge system with [a] ritualistic form of work,
- 5) having a representative form of government, and
- 6) that provides benefits in accordance with [Indiana Code § 27-11].

Id. (alteration in original) (quoting IND. CODE ANN. § 27-11-1-1 (West 2002)).

604. *Id.* (quoting Petition for Judicial Review at 4, *United Order of Ancient Druids*, 2007 WL 1439560).

605. *Id.* at *3.

606. *Id.*

607. *Id.* (citing IND. CODE ANN. § 27-11-2-2(2) (West 2002)).

608. *Id.*

609. *Id.*

610. *Id.*

611. *Id.*

612. No. 49T10-0604-TA-36, 2007 WL 1559294 (Ind. Tax Ct. May 31, 2007) (unpublished table decision).

company, initiated this action on April 6, 2006, appealing the denial of its request for a charitable or educational purposes exemption for the 2004 tax year for the portion of its property leased to Clarian Health Partners, Inc. (“Clarian”), a nonprofit corporation.⁶¹³ The property at issue was located in Carmel, Indiana and consisted of 7.77 acres containing the Methodist Medical Plaza of Carmel (“MMP”) and a parking lot.⁶¹⁴ Clarian rented 59% of MMP to provide various surgical and medical care, as well as to provide free or reduced medical care to indigent patients and medical students with a “experiential educational setting.”⁶¹⁵ HCPI’s request for the exemption was denied by the Hamilton County PTABOA and the BTR.⁶¹⁶ During the administrative hearing, HCPI claimed that the property was owned “for a charitable purpose and that Clarian occupied and used it for both charitable and educational purposes,” because it freed up money for Clarian to use for charitable care and medical student education.⁶¹⁷ HCPI argued this was further demonstrated by the fact that Clarian rented its portion of MMP at a below market rate.⁶¹⁸ In addition, HCPI reasoned that MMP was occupied for charitable purposes, because MMP was used by Clarian to provide indigent care.⁶¹⁹ The evidence HCPI used to support this argument consisted of Clarian’s 2003 Annual Fiscal Report, which stated that Clarian’s total charity care and community benefits for that year was over \$29 million.⁶²⁰ The report included care provided by MMP as well as Methodist Hospital, Indiana University Hospital, and Riley Hospital.⁶²¹ Clarian’s website promoting its participation in the Indiana University School of Medicine’s residency program was submitted as evidence of medical student involvement with MMP.⁶²² HCPI argued that Clarian would be the “true beneficiary” of any exemption received for MMP, because the exemption would decrease Clarian’s operating expenses owed to HCPI under its lease.⁶²³ The Tax Court rejected HCPI’s arguments, holding that the BTR’s final determination was not in error, because the evidence provided by HCPI “merely demonstrates that Clarian used the MMP to provide an *unspecified* amount of educational and charitable activity.”⁶²⁴ The evidence provided did not demonstrate MMP was used to provide charitable health care or education to

613. *Id.* at *1. “Clarian is ‘organized exclusively for charitable, educational, and scientific purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code[.]’” *Id.* (alteration in original) (quoting Cert. Admin. R. at 434).

614. *Id.*

615. *Id.*

616. *Id.*

617. *Id.* at *2.

618. *Id.*

619. *Id.* at *3.

620. *Id.*

621. *Id.*

622. *Id.*

623. *Id.*

624. *Id.* (emphasis added).

medical students more than 50% of the time.⁶²⁵ Further, the fiscal report was not specific to MMP, but instead, the fiscal report covered several Clarian facilities.⁶²⁶ HCPI failed to show that the property was *predominantly* used for charitable care and education.⁶²⁷ The Indiana Supreme Court has explained that it is not the *distribution of income* for charitable purposes that matters according to the statute, but instead, it is the *predominant use* of the facility.⁶²⁸

19. *Kosciusko County Property Tax Assessment Board of Appeals v. Hime's-Miller's & Strombeck's 3rd Additions, Inc.*⁶²⁹—The Kosciusko County PTABOA initiated this action on May 23, 2006, appealing the BTR's final determination which granted Hime's-Miller's & Strombeck's 3rd Additions, Inc. ("HMS") a 100% property tax exemption for the 2004 tax year for land located in North Webster, Indiana.⁶³⁰ The HMS land was made up of three non-contiguous lots used as easements for access to Webster Lake.⁶³¹ The land totaled less than one acre and was assessed in 2004 at \$80,500.⁶³² HMS initially requested the property tax exemption from the PTABOA and appealed the PTABOA's subsequent denial to the BTR.⁶³³ In this appeal, the PTABOA challenged the BTR's determination that HMS was entitled to the exemption because HMS met the requirements of I.C. § 6-1.1-10-16(c)(3).⁶³⁴ The PTABOA argued the BTR's determination was "erroneous because it applied the requirements of [the statute] without consideration of the constitutional requirement that the property must be used for an exempt purpose (i.e., a municipal, educational, literary, scientific, religious, or charitable purpose)."⁶³⁵

625. *Id.*

626. *Id.*

627. *Id.*

628. *Id.* (citing *State Bd. of Tax Comm'rs v. New Castle Lodge #147*, 765 N.E.2d 1257, 1263 (Ind. 2002)).

629. No. 49T10-0605-TA-50, 2007 WL 1821713 (Ind. Tax Ct. June 26, 2007) (unpublished table decision).

630. *Id.* at *1.

631. *Id.*

632. *Id.*

633. *Id.*

During the administrative hearing process, HMS claimed that, pursuant to Indiana Code [section] 6-1.1-10-16(c)(3), its land was exempt because: (1) HMS is a nonprofit corporation established for the purpose of 'aid[ing] in and protect[ing] in any way possible the environment and ecology of Webster Lake' and 'to develop, protect and improve the easement to Webster Lake dedicated to the lot owners' of HMS; (2) the parcel was less than one acre; and (3) it did not use the land to make a profit. HMS's resident agent, Mr. David Berger, also testified that HMS allows the public to use the property/easements for fishing or docking boats at no cost, and the local fire department uses one of the easements to get water from the lake.

Id. at *2 (citations omitted).

634. *Id.* at *2.

635. *Id.* (citing Petitioner's Brief at 1, 5, *Himes-Millers & Strombecks 3rd Additions*, 2007 WL

According to the Tax Court, the PTABOA was essentially arguing that unless a “use for an exempt purpose” is read into the statute when it is applied, the statute is unconstitutional.⁶³⁶ However, the PTABOA failed to meet its burden of demonstrating the unconstitutionality of the statute, which resulted in the affirmation of the BTR’s final determination.⁶³⁷ Instead of arguing why the statute or its application was unconstitutional as PTABOA was required to do, the PTABOA only argued that both the PTABOA and HMS failed to explain how or why the property’s use qualified as a municipal, education, literary, scientific, religious, or charitable purpose.⁶³⁸ Further, the PTABOA’s argument also failed, because the PTABOA assumed that retaining and preserving land and water’s natural characteristics was considered by the legislature to fit into one of the exempt purposes and that no use requirement is contained in I.C. § 6-1.1-10-16(c)(3).⁶³⁹ It is evident from a general reading of the statute that the legislature intended retaining and preserving land and water’s natural characteristics to fit into one of the exempt purposes.⁶⁴⁰ Further, the second assumption “defies logic,” because “if a taxpayer used the property in a manner inconsistent with its stated purpose for existence (such as making a profit), the exemption does not apply.”⁶⁴¹ The PTABOA’s failure to overcome the constitutional presumption of the statute and to demonstrate that the BTR erroneously applied the statute resulted in the affirmation of the BTR’s final determination.⁶⁴²

20. *Sisters of St. Francis Health Services, Inc. v. Lake County Property Tax Assessment Board of Appeals*.⁶⁴³—The Sisters of St. Francis Health Centers, Inc. (“SSFHC”) initiated this action on February 24, 2004, appealing the SBTC’s final determination that upheld the PTABOA’s decision to revoke the charitable purposes exemption for its offsite fitness center located in Schererville, Indiana, for the 1999 tax year.⁶⁴⁴ SSFHC, a nonprofit corporation and recognized as a 501(c)(3) organization, is the owner and operator of two northwest Indiana hospitals as well as eighteen “offsite” facilities.⁶⁴⁵ SSFHC conceded that portions of the facility used as a fitness/wellness center did not qualify for the exemption, and the PTABOA conceded that the portion of the facility used for a pediatric rehabilitation program did qualify for the exemption.⁶⁴⁶ The portion of the facility at issue was a public roller skating rink, which made up 22.6% of the total

1821713).

636. *Id.*

637. *Id.* at *2-3.

638. *Id.* at *3.

639. *Id.*

640. *Id.*

641. *Id.*

642. *Id.*

643. No. 49T10-0402-TA-6, 2007 WL 1874778 (Ind. Tax Ct. June 29, 2007) (unpublished table decision).

644. *Id.* at *1.

645. *Id.* at *1 & n.1.

646. *Id.* at *1.

facility.⁶⁴⁷ SSFHC argued the skating rink was entitled to the exemption, because the skating rink was operated as a community recreational facility and any excess revenue generated was used to subsidize SSFHC's hospital operations, including charity care.⁶⁴⁸ The Tax Court disagreed. Noting its past acknowledgment that "charity" includes more than "giving to the poor,"⁶⁴⁹ the Tax Court emphasized that merely holding the skating rink open to the public was not enough to qualify for the charitable exemption.⁶⁵⁰ The key test remains whether or not a facility is being predominately used for a charitable *purpose*.⁶⁵¹ SSFHC did not demonstrate how the skating rink relieved human want and suffering or how the public actually benefited from the facility. The Tax Court also rejected SSFHC's invitation to reject the requirement that a party provide evidence of relief from human want and instead use a new test consisting of the inquiry of whether or not property is a "gift" to the general public.⁶⁵² SSFHC failed to carry its burden, and the Tax Court upheld the SBTC's decision.⁶⁵³

21. *Miller Beach Investments, LLC v. Department of Local Government Finance*.⁶⁵⁴—On February 24, 2006, Miller Beach Investments ("MBI") initiated three appeals of seventeen final determinations made by the BTR regarding assessment of MBI's real property for the 2002 tax year.⁶⁵⁵ The seventeen properties at issue were unimproved residential parcels located in Gary, Indiana.⁶⁵⁶ During the year at issue, the parcels were owned by another party, James Nowacki, who sold the parcels to MBI in 2005 and assigned his appeal rights.⁶⁵⁷ MBI sought to overturn the BTR's final determinations, arguing that MBI provided evidence during the administrative process that the DLGF's assessments were incorrect.⁶⁵⁸ First, MBI argued that evidence of the price paid by Nowacki at a commissioner sale in 2002 reflected the properties' 2002 market values, because the sale was open, competitive, and the parcels were sold to the highest bidder.⁶⁵⁹ Nowacki purchased the parcels in 2002 for \$11,565, and the DLGF assessed the properties at \$81,700.⁶⁶⁰ Next, MBI argued that the evidence

647. *Id.*

648. *Id.* at *2.

649. *Id.* at *3 (citing *Coll. Corner, L.P. v. Dep't of Local Gov't Fin.*, 840 N.E.2d 905, 909 (Ind. Tax Ct. 2006)).

650. *Id.*

651. *Id.*

652. *Id.* (citing Oral Argument Transcript at 6, 11, 17-21, *Sisters of St. Francis Health Servs.*, 2007 WL 1874778).

653. *Id.*

654. Nos. 49T10-0602-TA-14, 49-T10-0602-TA-15, 49T10-0602-TA-16, 2007 WL 2405271 (Ind. Tax Ct. Aug. 22, 2007) (unpublished table decision).

655. *Id.* at *1.

656. *Id.*

657. *Id.*

658. *Id.* at *2.

659. *Id.*

660. *Id.*

of the price that MBI paid for the parcels in 2005 also demonstrated that the 2002 assessments were incorrect.⁶⁶¹ The parcels sold for only \$13,030 in 2005.⁶⁶² The Tax Court, however, upheld all seventeen BTR final determinations.⁶⁶³ Assessment regulations require a 2002 property assessment to reflect a property's market value-in-use as of January 1, 1999.⁶⁶⁴ MBI failed to explain how the evidence which MBI presented regarding the 2002 and 2005 sale prices related to the parcels' values as of January 1, 1999.⁶⁶⁵ As a result, MBI did not demonstrate that the BTR's determinations were either "arbitrary, capricious, or unsupported by substantial evidence."⁶⁶⁶

22. *Parks v. Licking Township Assessor*.⁶⁶⁷—The Parks initiated this tax appeal on March 15, 2006, challenging the 2002 real property assessment of the land and two apartment buildings that Parks owned in Hartford City, Indiana.⁶⁶⁸ The Parks' main argument on appeal was that the apartment buildings should have been valued using the General Commercial Residential ("GCR") pricing schedule instead of the residential pricing guidelines, because the buildings had always been used and listed as apartments, and thus, the buildings were commercial buildings.⁶⁶⁹ The Tax Court found the Parks "missed the point" in their argument.⁶⁷⁰ It is not sufficient for a taxpayer to claim that an assessor misapplied the assessment guidelines, rather a taxpayer must provide evidence that the assessed value of a property does not accurately reflect its market value-in-use.⁶⁷¹ Here, the Parks only focused the assessment methodology and provided no evidence of the property's market value-in-use.⁶⁷² Failure to present such evidence resulted in the Parks' failure to present a *prima facie* case that the assessment was incorrect.⁶⁷³

23. *Lake County Assessor v. United States Steel Corp.*⁶⁷⁴—The Lake County Assessor ("assessor") initiated this tax appeal on March 29, 2007, to appeal a final determination of the BTR regarding the 2001 real property assessment of United States Steel's ("USS") steel manufacturing plant located in Lake County,

661. *Id.*

662. *Id.*

663. *Id.* at *3.

664. *Id.* (citing IND. TAX COMM'RS, 2002 REAL PROPERTY ASSESSMENT MANUAL REVISION AAA 4 (2004)).

665. *Id.*

666. *Id.*

667. No. 49T10-0603-TA-29, 2007 WL 2398587 (Ind. Tax Ct. Aug. 23, 2007) (unpublished table decision).

668. *Id.* at *1.

669. *Id.* at *3.

670. *Id.*

671. *Id.*

672. *Id.* at *4.

673. *Id.*

674. No. 49T10-0703-TA-19, 2007 WL 2713642 (Ind. Tax Ct. Sept. 19, 2007) (unpublished table decision).

Indiana.⁶⁷⁵ This decision was on a motion for partial summary judgment filed by USS.⁶⁷⁶ The assessor argued on appeal that the BTR erred when it failed to admit evidence and documentation regarding a settlement agreement reached with USS with respect to a 2001 personal property tax appeal.⁶⁷⁷ Both the real property and personal property appeals involved USS's claim that it was entitled to additional obsolescence depreciation.⁶⁷⁸ The assessor claimed that the evidence regarding the personal property appeal established that *res judicata* should apply to USS's real property appeal.⁶⁷⁹ USS disagreed, moving for partial summary judgment regarding this claim.⁶⁸⁰ USS argued the BTR properly excluded the evidence at issue and that neither claim preclusion nor issue preclusion applied to the 2001 real property assessment.⁶⁸¹ First, USS argued claim preclusion did not apply, because the personal and real property appeals involved different effects of increased operating costs.⁶⁸² It argued in its personal property appeal that excess operating costs were the cause of the machinery and equipment's decreased value, but argued in its real property appeal that the operating costs contributed to the reduced value of its improvements.⁶⁸³ The assessor, however, argued that appeals were the same because the appeals were based on the same excess operating costs and the same methodology was used in both to establish the relationship between the increased costs and the loss of property value.⁶⁸⁴ The Tax Court agreed with USS and held claim preclusion did not apply to the real property appeal based on the principle that "real and personal property are distinct."⁶⁸⁵ Because these types of properties are distinct, the claims challenging the assessments of these types of properties are distinct.⁶⁸⁶ "Consequently, evidence that establishes an error on a personal property assessment does not necessarily establish an error on a real property assessment."⁶⁸⁷ USS next argued in its motion that issue preclusion did not apply to its real property appeal because the issues involved in two appeals were not identical.⁶⁸⁸ The issue in the real property appeal, according to USS, was whether or not the operating costs constituted *functional obsolescence*, whereas the issue in the personal property appeal was whether or not the operating costs constituted *abnormal*

675. *Id.* at *1.

676. *Id.*

677. *Id.*

678. *Id.*

679. *Id.*

680. *Id.*

681. *Id.* at *2.

682. *Id.*

683. *Id.*

684. *Id.*

685. *Id.* at *3 (citing *W. Select Props., L.P. v. State Bd. of Tax Comm'rs*, 639 N.E.2d 1068, 1073 (Ind. Tax Ct. 1994)).

686. *Id.*

687. *Id.*

688. *Id.*

obsolescence.⁶⁸⁹ On the other hand, the assessor argued that the issues were identical, because the same cause of obsolescence was claimed to reduce the value of both the real and personal property.⁶⁹⁰ Again, the Tax Court sided with USS and found that issue preclusion did not apply to the real property appeal.⁶⁹¹ The two issues were not combined into one issue simply because USS claimed both its real and personal property were impacted by the same causes of obsolescence.⁶⁹² The forms of obsolescence are different and are defined as such in the assessment regulations.⁶⁹³ Further, the regulations provide that functional obsolescence applies to real property and abnormal obsolescence applies to personal property.⁶⁹⁴ “Therefore, establishing the presence of abnormal obsolescence with respect to personal property is not the same as establishing the presence of functional obsolescence with respect to real property—even when the causes of that obsolescence are the same.”⁶⁹⁵ Because neither claim preclusion nor issue preclusion applied to USS’s real property appeal, its motion for partial summary judgment was granted.⁶⁹⁶

24. *Curtis v. Indiana Board of Tax Review*.⁶⁹⁷—In this opinion, the Tax Court ruled on the BTR’s motions to dismiss and strike Curtis’s motions to amend and supplement.⁶⁹⁸ Curtis initiated a tax appeal on April 9, 2007, appealing five BTR final determinations regarding the assessment of Curtis’s real property located in Lake County, Indiana, for the 1998, 1999, and 2000 tax years.⁶⁹⁹ The BTR moved to dismiss Curtis’s claim on several grounds, all of which the Tax Court denied.⁷⁰⁰ The BTR first argued the appeal should be dismissed for failure to name the proper parties in the petition under Indiana Trial Rules 12(B)(1) and 12(B)(6), because Curtis named the BTR as the respondent instead of the township assessor or the PTABOA, which is required by the AOPA and Tax Court Rule 4(B).⁷⁰¹ The BTR also argued that Curtis could not cure the defects by amending the petitions because the amended petitions were filed after the statute of limitations had run, and therefore, the amending petitions would be precluded from relating back to the original petition.⁷⁰² The Tax Court denied the BTR’s motions to dismiss and strike, finding a statement

689. *Id.*

690. *Id.*

691. *Id.* at *4.

692. *Id.*

693. *Id.*

694. *Id.*

695. *Id.*

696. *Id.*

697. No. 71T10-0704-SC-21, 2007 WL 2758754 (Ind. Tax Ct. Sept. 24, 2007) (unpublished table decision).

698. *Id.* at *1.

699. *Id.*

700. *Id.* at *1-4.

701. *Id.* at *1.

702. *Id.*

regarding the township assessor as a party to the BTR proceeding in the body of Curtis's original petition and Curtis's attachment of the BTR's findings and conclusions to the original petition naming the assessor as a respondent sufficient to satisfy the AOPA and Tax Court rule requirements.⁷⁰³ The Tax Court also dismissed the BTR's argument that the appeal should be dismissed for lack of personal jurisdiction due to the fact that Curtis failed to attach a certificate of service with his petition and to properly serve the parties.⁷⁰⁴ The Tax Court found the BTR waived this assertion when the BTR failed to raise the issue at the first opportunity, either in its answer or in its motion to dismiss.⁷⁰⁵ The Tax Court next addressed the BTR's claim that the appeal should be dismissed under Indiana Trial Rule 41(E) for failure to prosecute.⁷⁰⁶ The Tax Court disagreed with the BTR's claim that Curtis failed to diligently pursue the appeal.⁷⁰⁷ While there was delay on Curtis's part in remitting the fee for the certified administrative record to the BTR, such delay did not warrant a dismissal of the case as it was unintentional and had only a *de minimis* effect on the BTR's ability to prepare a defense.⁷⁰⁸ Conversely, the case should be decided on the merits in the interests of justice.⁷⁰⁹ The Tax Court subsequently denied Curtis's motion to amend his petition to the extent that Curtis sought to add the auditor and PTABOA as respondents, but the Tax Court granted Curtis's motions to supplement.⁷¹⁰

25. *Dowell v. Washington Township Assessor*.⁷¹¹—The Dowells initiated this tax appeal on November 17, 2006, challenging the 2002 assessment of their commercial real property located in Nashville, Indiana.⁷¹² The Dowells argued that the assessor improperly increased the base rate used to determine land assessments from \$10 per square foot to \$20 per square foot without conducting the required public hearing under I.C. § 6-1.1-4-13.6.⁷¹³ In support of their claim, the Dowells provided a Neighborhood Valuation Form they received from the assessor's office, which indicated a \$10 base rate.⁷¹⁴ The Dowells argued this rate was the final value approved by the PTABOA during the land valuation process; however, they admitted they were provided with a different Neighborhood Valuation Form during the PTABOA hearing that listed the approved final value as \$20.⁷¹⁵ The Tax Court held the Dowells did not establish the criteria for a

703. *Id.* at *2.

704. *Id.*

705. *Id.*

706. *Id.* at *3.

707. *Id.*

708. *Id.*

709. *Id.*

710. *Id.*

711. No. 49T10-0611-TA-100, 2007 WL 2955738 (Ind. Tax Ct. Oct. 11, 2007) (unpublished table decision).

712. *Id.* at *1.

713. *Id.*

714. *Id.* at *2.

715. *Id.*

required public hearing were met before the value was modified.⁷¹⁶ To succeed in their claim, the Dowells had to either demonstrate that the \$20 base rate used to assess their property was not the PTABOA's established final value or that the final established value was the \$10 base rate.⁷¹⁷ The Dowells did not establish either of these facts.⁷¹⁸ In contrast, there was no evidence that the form provided to the Dowells by the assessor's office included the final approved value.⁷¹⁹ There was, however, an indication that the form listing the \$10 base rate was the form submitted during the land valuation process, and the Dowells admitted there had been a public hearing regarding the \$10 rate.⁷²⁰ Because the Dowells did not show

that the \$20 value was not the result of a modification by the PTABOA as part of the land valuation process. Consequently, the Dowells have neither demonstrated that the Neighborhood Valuation Form with the \$10 base rate was the final value as approved by the PTABOA, nor that the form with the \$20 base rate was *not* the final value.⁷²¹

Subsequently, the BTR's final determination was affirmed.⁷²²

A factually similar appeal based on the same arguments was also made in the case of *Miller v. Washington Township Assessor*.⁷²³ The Tax Court decided both cases on the same date and came to the same conclusion in both cases.⁷²⁴

26. *First Bank v. Department of Local Government Finance*.⁷²⁵—First Bank of Whiting Trust No. 1857, along with several other petitioners, initiated this appeal on August 14, 2006, challenging the 2002 valuation of their real property located in Lake County, Indiana.⁷²⁶ The properties at issue were condominium units located in a complex named Cedar Point.⁷²⁷ The petitioners argued on appeal that the market value-in-use of their condominium units was not accurately reflected in the units' assessed values, because the units were not assessed according to their current use as apartments.⁷²⁸ To support their argument, at the BTR hearing the petitioners provided an appraisal conducted by a Certified General Real Estate Appraiser who used the income capitalization approach to

716. *Id.*

717. *Id.* at *1.

718. *Id.* at *2.

719. *Id.*

720. *Id.*

721. *Id.*

722. *Id.* at *3.

723. No. 49T10-0611-TA-101, 2007 WL 2955734 (Ind. Tax Ct. Oct. 11, 2007) (unpublished table decision).

724. *See id.* at *2.

725. No. 49T10-0608-TA-75, 2007 WL 4151846 (Ind. Tax Ct. Nov. 26, 2007) (unpublished table decision).

726. *Id.* at *1.

727. *Id.*

728. *Id.* at *2.

value the complex.⁷²⁹ The properties were valued as of April 1999.⁷³⁰ The appraiser “opined that the January 1 values would ‘probably not’ have been any different than the April 1 values.”⁷³¹ The Tax Court held the petitioners failed to prima facie establish that their assessments were improper, because the petitioners provided no probative evidence regarding how the April 1 values related to the January 1 values of the properties.⁷³² Regardless of the fact the appraiser was an expert witness, his statements were merely conclusory and were not sufficient to relate the two values together because no explanation was offered.⁷³³

*B. Personal Property Tax: Perdue Farms, Inc. v. Boone Township Assessor*⁷³⁴

Perdue Farms, Inc. (“Perdue”) initiated this action on July 7, 2006, appealing thirteen BTR final determinations denying its requests for personal property tax inventory exemptions for the 2003 tax year for turkeys located at its Dubois County, Indiana, growing facilities.⁷³⁵ Perdue, which is incorporated in Maryland, is engaged in the business of turkey production in Indiana.⁷³⁶ This turkey production business takes place throughout the state. The turkeys are bred in Lebanon, Indiana, the eggs are shipped to a hatchery in Vincennes, Indiana, and then some of the baby turkeys (poults) are shipped to facilities in Dubois County where they are raised until maturity.⁷³⁷ After the turkeys mature, they are sent to Washington, Indiana, to be slaughtered, processed, packaged, and shipped.⁷³⁸ During the year at issue, 94% of the Washington, Indiana, processing plant’s final turkey product was shipped out of state.⁷³⁹ Perdue timely filed its 2003 personal property tax returns with the proper township assessors in Dubois County, but later filed amended returns with the assessors requesting an interstate commerce inventory exemption for 94% of its turkeys located in DuBois County facilities. Perdue appealed to the BTR after all of its requests for exemptions were denied by the Dubois County PTABOA.⁷⁴⁰ The BTR subsequently denied the exemptions finding “the turkeys located at each of the Dubois County growing facilities were not the inventory of the processing plant because Perdue’s ‘turkey raising operations [were] separate and distinct from its turkey processing

729. *Id.*

730. *Id.*

731. *Id.* (citing Cert. Admin. R. at 4198).

732. *Id.*

733. *Id.*

734. No. 49T10-0607-TA-65, 2007 WL 1874791 (Ind. Tax Ct. June 29, 2007) (unpublished table decision), *trans. denied*, 878 N.E.2d 217 (Ind. 2007) (unpublished table decision).

735. *Id.* at *1-2.

736. *Id.* at *1.

737. *Id.*

738. *Id.*

739. *Id.*

740. *Id.*

operations.”⁷⁴¹ In this appeal, Perdue argued the turkeys located at Dubois County facilities constituted inventory because the turkeys were later processed by the company at its Washington, Indiana facility, and therefore, the BTR improperly denied its exemption.⁷⁴² In contrast, the assessors argued that because the turkeys constituted “farming inventory” based on their location at agricultural sites and being reported on tangible personal property tax returns, the turkeys are not exempted as inventory under I.C. § 6-1.1-10-29 as this provision does not specifically exempt “farming inventory.”⁷⁴³ The Tax Court agreed with Perdue and dismissed the assessors’ “farming inventory” argument.⁷⁴⁴ “The plain language of Indiana Code § 6-1.1-10-29(b)(2) exempts inventory, as defined by Indiana Code § 6-1.1-3-11, owned by a manufacturer or processor that *will be used* in manufacturing or processing operations.”⁷⁴⁵ Furthermore, the statute’s plain language does not indicate a loss of status for personal property just because it is not located at a processing or manufacturing site.⁷⁴⁶ What I.C. § 6-1.1-3-11 *does* require is that inventory be “held for processing or for use in production[.]”⁷⁴⁷ Perdue established by overwhelming evidence that its turkeys qualified for the interstate commerce inventory exemption, because the turkeys were owned and held for the sole purpose of meat processing and 94% of the turkey meat was processed, packaged, and shipped out of state.⁷⁴⁸ If the turkeys held at the Dubois County facilities were not inventory, then there would not be anything for Perdue to process.⁷⁴⁹ The BTR’s final determination was subsequently reversed.⁷⁵⁰

*C. Inheritance Tax: Indiana Department of State Revenue v.
Estate of Brandewiede*⁷⁵¹

The DOSR initiated this appeal on August 2, 2006, challenging the Bartholomew County Superior Court’s order allowing the estate to allocate inheritance tax deductions to beneficiaries before allocating them to the residuary.⁷⁵² The decedent died testate, and the estate filed an Indiana inheritance tax return on November 29, 2005.⁷⁵³ The return calculated the decedent’s gross estate at \$113,835.79, \$46,059.25 of which was allocated in the form of

741. *Id.* (alteration in original) (footnote omitted) (quoting Cert. Admin. R. at 312-15).

742. *Id.* at *2.

743. *Id.*

744. *Id.* at *2-3.

745. *Id.* at *3.

746. *Id.* (citing IND. CODE ANN. § 6-1.1-3-11 (West 2003)).

747. *Id.* (alteration in original) (quoting IND. CODE ANN. § 6-1-1-3-11 (West 2003)).

748. *Id.*

749. *Id.*

750. *Id.*

751. 873 N.E.2d 209 (Ind. Tax Ct. 2007).

752. *Id.* at 210-11.

753. *Id.* at 210.

combined probate and non-probate property to six named beneficiaries.⁷⁵⁴ The decedent provided in her will for the residuary of the estate to be paid to the Columbus Ward of the Church of Jesus Christ of Latterday Saints.⁷⁵⁵ The estate calculated the total deductions at \$50,228.75 and applied \$46,059.25 of this amount to the amount allocated to the named beneficiaries, resulting in no inheritance tax liability for the named beneficiaries.⁷⁵⁶ The remaining amount of deductions was allocated to the residuary, but because the residuary was transferred to a church, it was exempt from any inheritance tax.⁷⁵⁷ The DOSR argued the estate failed to properly apply the deductions under I.C. § 29-1-17-3.⁷⁵⁸ Instead of applying the deductions to the shares of the named beneficiaries first, the DOSR argued I.C. § 29-1-17-3, addressing the issue of abatement, required the estate to apply the deductions to the residuary first because the purpose of the statute is to prohibit haphazard payments from any estate item so that specific bequests are protected as much as possible.⁷⁵⁹ The estate argued that the DOSR could not rely on this statute because it applies to the issue of abatement, not the allocation of deductions, and that the allocation of deductions was within the estate's discretion.⁷⁶⁰ The Tax Court disagreed noting that even though there is no statutory provision providing for the allocation of deductions, "the Court of Appeals has previously explained that '[l]ogic dictates that [the] deduction must be attributed only to the party which expends the resources which constitute the deduction,'" which means that the deduction should be allocated to the actual expenditure.⁷⁶¹ Here, the expenses for which the deduction was being claimed were actually paid from the residuary, not the specific bequests.⁷⁶² Therefore, the estate improperly allocated the deductions, and the superior court's order was reversed.⁷⁶³

D. Sales and Use Tax

1. *Horseshoe Hammond, LLC v. Indiana Department of State Revenue.*⁷⁶⁴—Horseshoe Hammond ("HH") initiated this appeal after the DOSR failed to issue a final determination regarding its claim for refund, which included

754. *Id.*

755. *Id.*

756. *Id.* at 210-11.

757. *Id.* at 211.

758. *Id.* at 212.

759. *Id.* at 212-13.

760. *Id.* at 213.

761. *Id.* (alteration original) (quoting *In re Estate of Pfeiffer*, 452 N.E.2d 448, 451 (Ind. Ct. App. 1983)).

762. *Id.*

763. *Id.* at 213-14.

764. 865 N.E.2d 725 (Ind. Tax Ct.), *trans. denied*, 878 N.E.2d 207 (Ind. 2007) (unpublished table decision).

\$87,635.17 in use tax paid for complimentary merchandise and meals.⁷⁶⁵ HH, an Indiana corporation located in Hammond, Indiana, is a licensed riverboat operator that operates an excursion gaming riverboat.⁷⁶⁶ The boat is docked on Lake Michigan and provides gaming, a gift shop, and several bars and restaurants.⁷⁶⁷ In order to “cultivate customer relations so that customers w[ould] stay on the property, come to the property, or return to the property[,]” HH offered complimentary merchandise and meals to members of its Player’s Club.⁷⁶⁸ HH calculated use tax based on the retail price of these complimentary items and remitted the proper use tax to the DOSR.⁷⁶⁹ HH filed a motion for summary judgment,⁷⁷⁰ and the DOSR’s response brief was treated by the Tax Court as a cross-motion for summary judgment.⁷⁷¹ The Tax Court discussed the complimentary merchandise and meals separately. HH did not dispute that it owed use tax on the complimentary merchandise, rather it disputed the amount of use tax owed.⁷⁷² The DOSR, however, first argued that HH was required to remit sales tax on the merchandise because it was making a disguised retail transaction.⁷⁷³ The DOSR’s maintained that there was a disguised retail transaction, because, even though the merchandise was not transferred to the customers for money, the merchandise was still transferred for consideration, which was in the continued gaming and loyalty from the customers.⁷⁷⁴ Further, the DOSR cited *Monarch Beverage Co. v. Indiana Department of State Revenue*,⁷⁷⁵ which stated there is sufficient consideration if there is a benefit to the promisor or a detriment to the promisee.⁷⁷⁶ The DOSR argued there was sufficient consideration between the customers and HH, because the benefit to the customers was free merchandise and the detriment to HH was providing the free merchandise.⁷⁷⁷ The Tax Court rejected DOSR’s argument as unconvincing.⁷⁷⁸ No evidence was found that there had been a *bargained* for exchange.⁷⁷⁹ “[T]he

765. *Id.* at 726-27. Horseshoe Hammond filed its refund claim on March 13, 2003, and had not received a final determination on November 30, 2004. *Id.*

766. *Id.* at 726.

767. *Id.*

768. *Id.* (alteration in original) (quoting Petitioner’s Post Hearing Brief at 3, *Horseshoe Hammond*, 865 N.E.2d 725). The Player’s Club is a free membership program that is open to the casino’s patrons who are over twenty-one years of age. *Id.* at 726 n.1.

769. *Id.* at 726.

770. *Id.*

771. *Id.* at 727 n.3.

772. *Id.* at 728.

773. *Id.*

774. *Id.* (citing Respondent’s Brief at 7, 9, *Horseshoe Hammond*, 865 N.E.2d 725).

775. 589 N.E.2d 1209 (Ind. Tax Ct. 1992).

776. *Horseshoe Hammond*, 865 N.E.2d at 728-29 (citing Respondent’s Brief at 8, *Horseshoe Hammond*, 865 N.E.2d 725).

777. *Id.* at 729.

778. *Id.*

779. *Id.*

casino patrons never agreed or promised Horseshoe that they would continue their gaming activity for free merchandise.”⁷⁸⁰ While HH may have *hoped* that providing this merchandise would enhance customer relations, such merchandise was never *promised* to any customer, so the customer’s decision was discretionary.⁷⁸¹ Therefore, because there was no consideration, there was no retail transaction, and the merchandise was not subject to sales tax.⁷⁸² Because HH conceded it owed use tax on the merchandise, the next issue to be decided was how the use tax should be calculated.⁷⁸³ Citing the Indiana Administrative Code sections 6-2.5-3-2(a) and -3, the Tax Court determined that the use tax should be based on the price HH paid for the property and not the merchandise’s retail price.⁷⁸⁴ HH was entitled to a refund of use tax paid for the merchandise because it had remitted the tax based on the retail price.⁷⁸⁵

The DOSR made the same consideration argument regarding the imposition of sales tax for the complimentary meals that HH provided to Player’s Club members, and the argument was again rejected by the Tax Court.⁷⁸⁶ The DOSR argued in the alternative that HH was not entitled to a refund for use tax it paid for the storage, use, and consumption of meal components that were eventually incorporated into the meals.⁷⁸⁷ This argument was also rejected, because the purchase and *later* use of the meal components were held to be exempt under I.C. § 6-2.5-5-20(a), which provides an exemptions for food purchased for human consumption.⁷⁸⁸ A distinction was made between this use of food and the intended exclusion from the exemption of *prepared* food.⁷⁸⁹ “[H]ow Horseshoe uses the items is irrelevant (i.e., whether Horseshoe uses the food to prepare meals that are to be sold, uses them to prepare meals that are to be given away, or it simply throws the food away), as its *use of those items* is not taxable.”⁷⁹⁰ Thus, HH was entitled to a refund for use tax paid on the meal components used for the complimentary meals,⁷⁹¹ and summary judgment was granted in favor of HH.⁷⁹²

2. *Lafayette Square Amoco, Inc. v. Indiana Department of State Revenue.*⁷⁹³—Lafayette Square Amoco, Inc. (“LSA”) initiated this action on October 12, 2005, appealing the DOSR’s final determination denying LSA’s

780. *Id.*

781. *Id.*

782. *Id.*

783. *Id.*

784. *Id.* at 730.

785. *Id.*

786. *Id.*

787. *Id.*

788. *Id.* at 731-32.

789. *Id.* at 731.

790. *Id.* at 732 n.12.

791. *Id.* at 732.

792. *Id.*

793. 867 N.E.2d 289 (Ind. Tax Ct. 2007).

protest of sales tax liability for income received from oil changes during the 1999-2001 tax years.⁷⁹⁴ LSA is the operator of a gas station located in Lafayette, Indiana.⁷⁹⁵ LSA provided general automotive services during the tax years at issue, including oil changes.⁷⁹⁶ The DOSR audited LSA in 2002 and, as a result, issued proposed assessments of sales tax based on the determination that LSA did not charge sales tax for oil changes during the years at issue, which resulted in the incorrect amount of sales tax being remitted to the DOSR.⁷⁹⁷ Prior to and throughout the audit, the DOSR requested (both orally and through written communication) that LSA provide records so that the proper amount of sales tax could be calculated.⁷⁹⁸ LSA provided some documentation, but the documentation was not related to the tax years at issue.⁷⁹⁹ LSA offered DOSR access to its computer to inspect invoices despite its own admission that inspecting the documents through this method would be difficult and time-consuming.⁸⁰⁰ The DOSR requested paper copies of invoices, but they were never provided.⁸⁰¹ To make a Best Information Available assessment, the DOSR relied on one invoice from September 1999, which indicated LSA had not charged any sales tax on the oil change.⁸⁰² LSA protested the assessment in December 2002 and provided fifty-seven oil change invoices that showed sales tax had been charged on those transactions.⁸⁰³ However, during a supplemental audit in January 2005, LSA was not able to provide all the service center invoices, claiming the invoices were no longer available, because the computer automatically purged them after three years.⁸⁰⁴ LSA was not able to meet its burden to prove the assessment was wrong.⁸⁰⁵ I.C. § 6-8.1-5-4 requires taxpayers that are subject to a listed tax to “keep books and records so that the [DOSR] can determine the amount, if any, of the person’s liability for that tax by reviewing those books and records.”⁸⁰⁶ When LSA failed to submit all of its invoices for the years at issue, and the invoices were unable to be reviewed during the audit or during this appeal, LSA was unable to meet its burden of proof.⁸⁰⁷ LSA was entitled to receive credit for the fifty-seven invoices which LSA did submit; however, these invoices did not prove that the rest of the tax assessment was

794. *Id.* at 290.

795. *Id.*

796. *Id.*

797. *Id.*

798. *Id.* at 291.

799. *Id.*

800. *Id.*

801. *Id.* at 292.

802. *Id.*

803. *Id.*

804. *Id.*

805. *Id.*

806. *Id.* at 292-93 (quoting IND. CODE ANN. § 6-8.1-5-4 (West 2001)).

807. *Id.* at 293.

incorrect.⁸⁰⁸ Additionally, LSA did not demonstrate that such fifty-seven invoices were a representative sample of all of the invoices for the years at issue.⁸⁰⁹ Further, the invoices were selected by LSA's president, which was in contrast to the auditor's testimony that indicated the DOSR typically selects the representative sample.⁸¹⁰ LSA was also not entitled to a waiver of the 10% negligence penalty imposed under I.C. § 6-8.1-10-2.1, because LSA did not demonstrate that LSA had reasonable cause for its failure to remit the amount of deficient sales tax, and its lack of awareness that sales tax had not been applied to at least one invoice indicated LSA was actually negligent.⁸¹¹ Therefore, the DOSR's final determination was affirmed.⁸¹²

E. Corporate Income Tax

1. *Miller Brewing Co. v. Indiana Department of State Revenue*.⁸¹³—Miller Brewing Co. ("Miller") initiated this action on July 24, 2006, appealing the DOSR's denial of Miller's request for a refund of adjusted gross income tax and supplemental net income tax ("AGIT") paid during the 1997, 1998, and 1999 tax years.⁸¹⁴ This opinion followed Miller's motion for summary judgment filed December 15, 2006.⁸¹⁵ Based on the Tax Court's July 27, 2005 opinion in *Miller Brewing Co. v. Indiana Department of State Revenue*,⁸¹⁶ Miller argued the DOSR was barred from denying its refund due to issue preclusion.⁸¹⁷ The issue in this case involved the sales factor of the apportionment formula.⁸¹⁸ Miller, a Wisconsin corporation, is a seller of malt beverage products to customers in several states and is headquartered in Milwaukee, Wisconsin.⁸¹⁹ Customers place orders with Miller through the Milwaukee office and have three options for transferring the products from the breweries to the customers' chosen destinations: pick up the products with their own trucks, arrange transportation by a third-party common carrier, or have Miller arrange transportation by common carrier.⁸²⁰ Miller filed corporate income tax returns for the 1997, 1998,

808. *Id.*

809. *Id.* at 293 n.6.

810. *Id.*

811. *Id.* at 294.

812. *Id.*

813. (*Miller II*), No. 49T10-0607-TA-69, 2007 WL 1667128 (Ind. Tax Ct. June 8, 2007) (unpublished table decision).

814. *Id.* at *1-2.

815. *Id.* at *2. The Tax Court instructed the parties to limit their briefs to a discussion of issue preclusion. *Id.*

816. (*Miller I*), 831 N.E.2d 859 (Ind. Tax Ct. 2005).

817. *Miller II*, 2007 WL 1667128, at *2.

818. *Id.* at *1 n.2.

819. *Id.* at *1.

820. *Id.* "Regardless, the customers decided how to transport the goods, as possession and title to the products transferred to them at the breweries." *Id.*

and 1999 tax years because of its income from sales to Indiana customers.⁸²¹ However, Miller only reported sales on its 1997 return when it arranged the common carrier, and Miller did not report any Indiana sales on its 1998 or 1999 returns.⁸²² Later, Miller amended its 1997 return to request a refund of \$13,391 plus any statutory interest.⁸²³ The DOSR audited Miller, which resulted in a proposed AGIT assessment of \$806,366.23 for the 1997, 1998, and 1999 tax years.⁸²⁴ The assessment only excluded sales when the customers used their own trucks to pick up products.⁸²⁵ Miller protested the assessment in November 2001.⁸²⁶ The *Miller I* opinion, which involved the 1994, 1995, and 1996 tax years, was issued while the protest was pending and held that “pursuant to the [DOSR’s] own regulation, Miller’s sales of products that were transported by customer-arranged common carriers to Indiana customers were not made in Indiana and, therefore, were not to be included in the numerator of Miller’s sales factor of its adjusted gross income tax apportionment formula.”⁸²⁷ The DOSR conducted an administrative hearing to review Miller’s protest for the 1997, 1998, and 1999 tax years, in which Miller requested a net refund of \$1,138,488, but ultimately the DOSR denied the entire protest and request.⁸²⁸ This appeal followed the DOSR’s determination. The Tax Court disagreed with Miller that issue preclusion barred the DOSR from denying Miller’s refund request regarding sales involving customer-arranged common carriers.⁸²⁹ Focusing on the doctrine that “each tax year stands alone,” the Tax Court held that issue preclusion does not apply to revenue cases.⁸³⁰ Additionally, the Tax Court dismissed Miller’s argument that the Tax Court’s decision in *Lindemann v. Wood*⁸³¹ stands for the proposition that issue preclusion can still apply despite the “each tax year stands alone doctrine,”⁸³² though *Lindemann* was a property tax case.⁸³³ Issue preclusion did not conflict with the doctrine in that case because property tax assessments

821. *Id.*

822. *Id.*

823. *Id.*

824. *Id.*

825. *Id.*

826. *Id.*

827. *Id.*

828. *Id.* at *2. The administrative hearing was conducted on March 24, 2006 and the DOSR issued its final determination on June 12, 2006. *Id.*

829. *Id.* at *3.

830. *Id.*

831. 799 N.E.2d 1230 (Ind. Tax Ct. 2003).

832. *Miller II*, 2007 WL 1667128, at *3. In *Lindemann*, “the Court held that issue preclusion barred an assessor from increasing the grade of the taxpayers’ improvement in a property tax assessment prior to the next general reassessment absent a change of circumstances in the improvement because the taxpayers had already successfully appealed their improvement’s grade.” *Id.* (citing *Lindemann*, 799 N.E.2d at 1232-34).

833. *Id.*

do not change every year.⁸³⁴ The assessments do not change until a general reassessment.⁸³⁵ In contrast, AGIT assessments change annually.⁸³⁶ “Therefore, it stands to reason that while issue preclusion may be appropriate in certain property tax cases, it is generally not applicable in revenue cases.”⁸³⁷ Miller’s motion for summary judgment was consequently denied.⁸³⁸

2. *Welch Packaging Group, Inc. v. Indiana Department of State Revenue*.⁸³⁹—Welch, an Indiana corporation with a principal place of business in Elkhart, Indiana, initiated this tax appeal on March 11, 2005, appealing the DOSR’s imposition of additional corporate income tax for the 1998, 1999, and 2000 tax years.⁸⁴⁰ The Tax Court heard the case on the parties’ cross motions for summary judgment.⁸⁴¹ Welch is the parent company of two subsidiaries subject to the Michigan Single Business Tax (“MSBT”) because of the subsidiaries’ employment of salespeople who both solicit business in and deliver products to Michigan.⁸⁴² For the years at issue, Welch and its subsidiaries filed consolidated Indiana adjusted gross income tax returns and excluded Michigan sales from the numerator of their sales factor when using the three-factor apportionment formula to compute their combined tax liability.⁸⁴³ The DOSR determined during an audit that Welch should have included the Michigan sales in the numerator and issued proposed assessments totaling \$64,612.13 against Welch.⁸⁴⁴ Welch protested the proposed assessments, but the DOSR denied its request.⁸⁴⁵ Welch argued on appeal that “pursuant to the plain language of Indiana Code [section] 6-3-2-2(n)(1), [Welch] was taxable in Michigan—and therefore was not required to place the Michigan sales in the numerator of its sales factor—because [Welch] was subject to the MSBT,” which is a franchise tax on the privilege of doing business in Michigan.⁸⁴⁶ Conversely, the DOSR argued the Michigan sales were subject to the “throwback rule,”⁸⁴⁷ because the MSBT is not a franchise tax on the

834. *Id.* (citing *Lindemann*, 799 N.E.2d at 1233 nn.4, 6).

835. *Id.*

836. *Id.*

837. *Id.*

838. *Id.*

839. No. 49T10-0503-TA-21, 2007 WL 3348012 (Ind. Tax Ct. Nov. 13, 2007) (unpublished table decision).

840. *Id.* at *1.

841. *Id.*

842. *Id.*

843. *Id.*

844. *Id.*

845. *Id.*

846. *Id.* at *2 (citing Petitioner’s Brief in Support of Its Motion for Summary Judgment at 8-9, *Welch Packaging Group*, 2007 WL 3348012).

847. The “throw-back rule” is contained in I.C. § 6-3-2-2(e)(2) and provides that “sales will be ‘thrown-back’ to Indiana if . . . the taxpayer who made the sales is not taxable in the state of the purchaser.” *Id.* at *2 n.2 (citing IND. CODE ANN. § 6-3-2-2(e)(2) (West 2002)).

privilege of doing business in Michigan.⁸⁴⁸ The DOSR argued the MSBT could not be a franchise tax because it was a value-added tax, not a tax based on income.⁸⁴⁹ The Tax Court rejected the DOSR's arguments, citing both the definition of a franchise tax and I.C. § 6-3-2-2(n)(1), which provides that that a franchise tax can be measured by net income or another standard,⁸⁵⁰ as well as finding that "[t]he MSBT is a franchise tax on the privilege of doing business in Michigan."⁸⁵¹ Because the MSBT is a franchise tax on the privilege of doing business in Michigan, Welch was correct in omitting its Michigan sales in the numerator of its sales factor when it applied the Indiana three-factor apportionment formula.⁸⁵²

*F. Controlled Substance Excise Tax ("CSET"): Harrison v. Indiana
Department of State Revenue*⁸⁵³

The Harrisons, who were married to each other, initiated this action on September 24, 2004, appealing the DOSR's denial of the Harrisons' protest of a CSET assessment of \$48,912.33 following criminal plea agreements.⁸⁵⁴ In December 2000, the Harrisons were arrested and charged with possession of marijuana with intent to deliver and reckless possession of paraphernalia.⁸⁵⁵ Mr. Harrison was also charged with maintaining a public nuisance.⁸⁵⁶ In June 2003, Mrs. Harrison entered into a pretrial diversion agreement, and Mr. Harrison entered into a plea agreement with the state which resulted in a guilty plea for the Class D felony of maintaining a common nuisance that was subsequently accepted by the circuit court.⁸⁵⁷ Upon written notification of the plea agreements, the DOSR assessed the Harrisons with the CSET and levied on several accounts.⁸⁵⁸ The Tax Court issued an opinion after cross motions for summary judgment.⁸⁵⁹ In their motion, the Harrisons argued that "because a CSET assessment constitutes a criminal offense and punishment for double jeopardy

848. *Id.* (citing Respondent's Brief in Support of Its Motion for Summary Judgment at 10, *Welch Packaging Group*, 2007 WL 3348012).

849. *Id.* (citing Respondent's Brief in Support of Its Motion for Summary Judgment at 6, 10-12, *Welch Packaging Group*, 2007 WL 3348012).

850. *Id.* at *3 (citing IND. CODE ANN. § 6-3-2-2(n)(1) (West 2002)). The Tax Court also noted that "for purposes of . . . [the] throw-back rule, the way the franchise tax is measured is of no significance." *Id.*

851. *Id.* (emphasis added) (citing *Trinova Corp. v. Dep't of Treasury*, 445 N.W.2d 428, 431-32 (Mich. 1989)).

852. *Id.*

853. 876 N.E.2d 814 (Ind. Tax Ct. 2007).

854. *Id.* at 815.

855. *Id.*

856. *Id.*

857. *Id.*

858. *Id.*

859. *Id.* at 816.

purposes, Indiana's joinder and successive prosecution statutes . . . apply to CSET proceedings."⁸⁶⁰ The Tax Court rejected this argument, holding that "Indiana's joinder and successive prosecution statutes do not apply to CSET proceedings."⁸⁶¹ First, an individual's conduct is not considered to be criminal unless the legislature defines the conduct as such.⁸⁶² The GA has not defined the CSET as a statutory criminal offense and even removed past references to such conduct constituting a felony.⁸⁶³ On the contrary, the GA has actually indicated frequently in I.C. § 6-7-3-1 and following that the CSET is not considered a criminal offense, because neither an arrest nor a criminal conviction are required for the CSET to be imposed, payment of the tax does not legalize the activity for which the tax is imposed or shield the taxpayer from being criminally prosecuted, and because the statute explicitly states the CSET is intended to be imposed in addition to criminal penalties.⁸⁶⁴ Because the CSET is primarily civil in nature and not a statutory criminal offense, the joinder and successive prosecutions do not apply to proceedings involving the CSET, and the Harrison's motion for summary judgment was denied.⁸⁶⁵

*G. Miscellaneous: Goldstein v. Indiana Department of Local
Government Finance*⁸⁶⁶

Goldstein, along with several other petitioners, initiated this action on September 6, 2007, challenging the legality and constitutionality of several state and local taxation practices in the form of a verified petition for judicial review.⁸⁶⁷ The petition included the following challenges:

- 1) the legality of the vote, taken by the Indianapolis-Marion County City-County Council, which raised Marion County's income tax from 1% to 1.65%, effective October 1, 2007;
- 2) the constitutionality of the directive, issued by Indiana Governor Mitchell E. Daniels, Jr. (and upon which the [DLGF] acted), which extended the statutorily prescribed deadline for Indiana counties to adopt local option income taxes;
- 3) the constitutionality of the multiple tax district system utilized within Indiana's counties;
- 4) the constitutionality of taxing Indiana residences for the purpose of raising monies for the Common School Fund; and
- 5) the constitutionality of numerous property assessment and taxation

860. *Id.* (citing Petitioner's Motion for Summary Judgment at 3, *Harrison*, 876 N.E.2d 814).

861. *Id.* at 817 (emphasis added).

862. *Id.*

863. *Id.* (citing 1996 Ind. Acts 1579, 1580-81).

864. *Id.* (citing IND. CODE ANN. §§ 6-7-3-1, -5, -8, -9, -10, -20 (West 2001)).

865. *Id.* at 817-18.

866. 876 N.E.2d 391 (Ind. Tax Ct. 2007).

867. *Id.* at 392.

practices in Indiana.⁸⁶⁸

Additionally, Goldstein also sought an emergency order to enjoin the imposition of a 1.65% local income tax rate in Marion County as well as an order preventing the DLGF from notifying counties that local option income taxes could be adopted after the statutory deadline while the case was pending.⁸⁶⁹ The DLGF countered with motions to dismiss for lack of subject matter jurisdiction based on Goldstein's failure to exhaust administrative remedies and for failure to state a claim upon which relief could be granted.⁸⁷⁰ Goldstein conceded the lawsuit did not arise after any final determination by the BTR or DOSR, which is a prerequisite for exhausting administrative remedies, but argued that the petitioners were still entitled to judicial review for several reasons and should be excused from exhausting administrative remedies.⁸⁷¹ Goldstein argued the petitions should be excused from exhausting administrative remedies because such remedies would be either inadequate or futile because administrative agencies implicated do not have the power to rule on such "global" constitutional challenges, the issues raised in their petition is of an "unparalleled public interest" that warrants a decision by the Tax Court, and because the Tax Court "might" have jurisdiction over the claims pursuant to I.C. § 36-4-4-5.⁸⁷² The Tax Court subsequently rejected all three arguments and dismissed the case for lack of subject matter jurisdiction.⁸⁷³ First, the Indiana Supreme Court has made clear that even if a taxpayer only raises constitutional claims, the taxpayer is still required to seek administrative remedies before it can proceed to the Tax Court.⁸⁷⁴ The legislature has not conferred original jurisdiction on the Tax Court for unconstitutional taxation claims.⁸⁷⁵ Similarly, the Tax Court also has not been given subject matter jurisdiction over issues that are in the public's interest.⁸⁷⁶ Even if the Tax Court were to examine the claims, doing so would be purely advisory, and the Tax Court is not allowed to issue advisory opinions.⁸⁷⁷ Finally, I.C. § 36-4-4-5 does not apply to the Tax Court, because the Tax Court is not a court of general jurisdiction and the case does not involve an issue of whether or not the executive or legislative branch should have exercised a particular power.⁸⁷⁸ In contrast, the statute "appears to relate to a court of general jurisdiction's authority to assign responsibility for an act to the appropriate

868. *Id.*

869. *Id.*

870. *Id.* & n.2.

871. *Id.* at 394.

872. *Id.* at 394-95.

873. *Id.* at 396.

874. *Id.* at 394 (citing *State Bd. of Tax Comm'rs v. Montgomery*, 730 N.E.2d 680, 686 (Ind. 2000)).

875. *Id.*

876. *Id.* at 395.

877. *Id.*

878. *Id.* at 396.

executive or legislative body.”⁸⁷⁹ The case was, therefore, dismissed for lack of subject matter jurisdiction.⁸⁸⁰ Moreover, because the Tax Court lacked subject matter jurisdiction over the claim, the Tax Court did not have the authority to grant the requested injunction.⁸⁸¹

879. *Id.* (citing IND. CODE ANN. § 36-4-4-5 (West 2007)).

880. *Id.*

881. *Id.* at 396 n.6.

RECENT DEVELOPMENTS IN INDIANA TORT LAW

ANN L. THRASHER PAPA*

This Article discusses developments in tort law in Indiana during the survey period, October 1, 2006, through September 30, 2007. The subject of this Article is such that the Article does not attempt to contain either a comprehensive or exhaustive examination of all tort cases decided during the survey period.

I. NEGLIGENCE¹

A. *Duty of Care*

The Indiana Court of Appeals explained the modern rule, or foreseeability doctrine, used with regard to negligence claims and the work of contractors in *Bond v. Walsh & Kelly, Inc.*² In *Bond*, Rory Bond (“Bond”) was seriously injured while riding as a passenger in a Jeep Wrangler when the Jeep’s passenger side tires dropped off a pavement edge onto a shoulder.³ Although the road had been recently paved, there was a drop off from the paved road to the shoulder.⁴ The passenger side windshield hit a utility pole and the Jeep rolled over.⁵ Bond sued the Town of Merrillville (“Town”), the Jeep’s driver, and Walsh & Kelly, Inc. (“Walsh”), the contractor that paved the road.⁶ The appeal only involved the trial court’s summary judgment in favor of Walsh.⁷

The court of appeals explained that the former rule, the acceptance rule, no longer applies to claims of negligence and contractor work.⁸ The acceptance rule provided “that contractors do not owe a duty to third parties after the owner has accepted the [contractor’s] work.”⁹

The current rule, referred to as the modern rule or the foreseeability doctrine,

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1. The Indiana Court of Appeals’s decision in *Filip v. Block*, 858 N.E.2d 143 (Ind. Ct. App. 2006), decided during the survey period, was vacated by the Indiana Supreme Court’s opinion in *Filip v. Block*, 879 N.E.2d 1076 (Ind. 2008). The Indiana Supreme Court’s decision will not be addressed in detail herein because it is outside the current survey period. Nevertheless, the issues in the court’s decision were related to: (1) a procedural question about the use of designated evidence, (2) the discovery rule and statute of limitations as applied in a negligence action arising out of a fire loss, and (3) whether an insurance agent breached her duty to advise in procurement of insurance and subsequent notification of inadequate coverage. *Filip*, 858 N.E.2d at 146, *rev’d*, 879 N.E.2d 1076 (Ind. 2008).

2. 869 N.E.2d 1264, 1266 (Ind. Ct. App. 2007).

3. *Id.* at 1265.

4. *Id.*

5. *Id.* at 1265-66.

6. *Id.* at 1266.

7. *Id.*

8. *Id.*

9. *Id.* (citing *Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167, 170 (1996)).

set forth by the Indiana Supreme Court in *Peters v. Forster*,¹⁰ “provides that a contractor is liable for injuries or death of third persons after acceptance by the owner where the work is reasonably certain to endanger third parties if negligently completed.”¹¹ The modern rule does not create absolute liability for the contractor and does not abrogate the elements of negligence: duty, breach of duty, and proximate cause.¹² Furthermore, “[t]here is no breach of duty, and consequently no negligence, where a contractor merely follows the plans or specification given to him by the owner so long as the plans are not so obviously dangerous or defective that no reasonable contractor would follow them.”¹³

In *Bond*, the court of appeals affirmed the trial court’s grant of summary judgment in favor of Walsh¹⁴ and reasoned first that there was no assertion that the repaving plans followed by Walsh were “on their face, obviously dangerous or defective.”¹⁵ Furthermore, there was never an assertion that Walsh paved the roadway in a negligent manner.¹⁶ The designated evidence provided that Walsh completed the work expected from it, and the Town had the striping and shoulder stone placement responsibilities.¹⁷ Therefore, the court concluded that “the designated evidence does not create a genuine issue of material fact as to whether the plans were so obviously dangerous or defective that no reasonable contractor would follow them.”¹⁸

Another court of appeals case decided during the survey period was *Precedent Partners I, L.P. v. Hulen*.¹⁹ The facts of this case are likely not uncommon as neighborhoods develop and residential areas become more densely populated. Michelle Hulen (“Hulen”) was riding her bicycle along a road in her neighborhood, “The Meadows, when she turned onto a cross street and collided with a pickup truck driven by Jose Guardado,” a contractor hired to do drywall work at a residence in The Meadows.²⁰ Hulen suffered serious and permanent physical injuries.²¹

Hulen filed suit against several organizations, private and government, and individuals, but the appeal discussed herein involved only a summary judgment grant in favor of defendants Precedent Partners I, L.P. (“Precedent”) and The

10. 804 N.E.2d 736, 742 (Ind. 2004).

11. *Bond*, 869 N.E.2d at 1266 (citing *Peters*, 804 N.E.2d at 742). In adopting this modern rule, the Indiana Supreme Court “embraced the trend reflected in the Restatement (Second) of Torts and stated that the new approach is ‘consistent with traditional principles of negligence upon which Indiana’s scheme of negligence law is based.’” *Id.* (quoting *Peters*, 804 N.E.2d at 742).

12. *Id.*

13. *Id.* (citing *Peters*, 804 N.E.2d 742).

14. *Id.* at 1267.

15. *Id.* at 1266.

16. *Id.* at 1266-67.

17. *Id.* at 1267.

18. *Id.*

19. 863 N.E.2d 328 (Ind. Ct. App. 2007).

20. *Id.* at 330.

21. *Id.*

Meadows homeowners' association (the "Association").²² Hulen argued on appeal that there were "genuine issues of material fact whether Precedent and the Association were negligent in the design and maintenance of the median at the location of the accident and in failing to post signs 'directing or warning of construction traffic.'"²³ The court of appeals disagreed.

The court first found that the case was not a premises liability matter because there was no designated evidence showing that Precedent or the Association did anything on the property they owned that created a hazardous condition that caused Hulen's accident.²⁴ The court reasoned that Hulen was riding on a public street, she was not an invitee or licensee of Precedent or the Association, and neither of the two defendants had control over the truck's driver or the company for which he worked.²⁵

The court also found that neither Precedent nor the Association had a duty to redirect construction traffic or post warning signs because there was "simply no evidence of a danger posed to residents from construction traffic."²⁶ In conclusion, the court of appeals held, "[t]he law does not impose a duty on a business to guard against injury to the public from the negligent acts of someone over whom the business has no control and which injury occurs off the business' premises."²⁷ The trial court's denial of Precedent's and the Association's motion for summary judgment was reversed and the case remanded.²⁸

B. Res Ipsa Loquitor

In *Cincinnati Insurance Co. v. Davis*,²⁹ the Indiana Court of Appeals faced an appeal from a trial court's grant of summary judgment in favor of three defendants on the plaintiffs' negligence claim.³⁰ The plaintiffs were Cincinnati Insurance Company and Indiana Insurance Company (collectively, "the Insurers").³¹ The defendants were "Dr. T. Brandon Davis ("Davis"), Arbor Neuropsychological Assessment Clinics, Inc. ("Arbor"), and Culligan United State Filter ("Culligan")."³² The court of appeals reversed the trial court and found that summary judgment was not appropriate as to any of the three

22. *Id.*

23. *Id.* at 331 (quoting Brief for Appellant at 30).

24. *Id.* at 332 (citing *St. Casimir Church v. Frankiewicz*, 563 N.E.2d 1331, 1333 (Ind. Ct. App. 1990)).

25. *Id.* The court stated in dicta, "Regardless, the undisputed designated evidence shows that the vegetation and light fixtures in the median did not obscure either [the driver's] or [Hulen's] view as they approached the intersection." *Id.*

26. *Id.* at 333.

27. *Id.* (citing *Snyder Elevators, Inc. v. Baker*, 529 N.E.2d 855, 859 (Ind. Ct. App. 1988)).

28. *Id.*

29. 860 N.E.2d 915 (Ind. Ct. App. 2007).

30. *Id.* at 917.

31. *Id.*

32. *Id.*

defendants.³³

Davis used an office space insured by the Insurers on Wednesdays only.³⁴ The office had a water filtration system, which was serviced by Culligan.³⁵ After flooding was discovered in the office building, a water leak was “traced to the Culligan filtration system in Davis’s office.”³⁶ The Insurers paid over \$100,000 in claims related to the flooding, and sued the defendants for negligence.³⁷

At separate times, the trial court granted motions for summary judgment in favor of each defendant that basically stated the same reason for the ruling: “Insurers had ‘designated no evidence tending to show negligence on the part of [Davis]’ and had failed to establish the applicability of *res ipsa loquitor*.”³⁸ After first establishing jurisdiction over the appeals, the court of appeals addressed each defendant’s summary judgment.

First, with regard to Davis’s summary judgment, the court examined the *res ipsa loquitor* doctrine, which is a qualified exception to the rule that “the mere fact that an injury occurred will not give rise to a presumption of negligence.”³⁹ *Res ipsa loquitor* means “the thing speaks for itself.”⁴⁰ The doctrine

is premised upon the assumption that in certain instances an occurrence is so unusual that, absent a reasonable justification or explanation, those persons in control of the situation should be held responsible. While the occurrence oftentimes is “unusual” in the sense of being rare or bizarre, that is not a prerequisite to the application of the doctrine.⁴¹

The court restated the rule that, in summary judgment, it is the moving party who must first establish a lack of genuine issue of material fact, and the respondent who then must come forward with contrary evidence.⁴² The court concluded that Davis was not entitled to summary judgment because the evidence designated by both Davis and the Insurers indicates that the water leak was caused by “acts that suggest a failure to exercise reasonable care” and “the incident more probably resulted from negligence as opposed to another cause.”⁴³

The court also concluded, based upon the designated evidence, that the *res ipsa loquitor* doctrine might just apply to this case, and therefore a genuine issue

33. *Id.* at 925-26.

34. *Id.* at 918.

35. *Id.*

36. *Id.*

37. *Id.* The Insurers complaint originally named Davis and Culligan as defendants. *Id.* at 919. The complaint was amended later to include Arbor. *Id.* This case involved numerous pleadings to the trial court. *Id.*

38. *Id.* (quoting Brief for Appellant at 71).

39. *Id.* at 923 (quoting *Gold v. Ishak*, 720 N.E.2d 1175, 1180 (Ind. Ct. App. 1999)).

40. *Id.* (quoting *Rector v. Oliver*, 809 N.E.2d 887, 889 (Ind. Ct. App. 2004)).

41. *Id.* (quoting *Shull v. B.F. Goodrich Co.*, 477 N.E.2d 924, 926 (Ind. Ct. App. 1985)).

42. *Id.* at 924 (citing *Jarboe v. Landmark Cmty. Newspapers of Ind.*, 644 N.E.2d 118, 123 (Ind. 1994)).

43. *Id.*

of material fact remained as to the applicability of the *res ipsa loquitor* doctrine.⁴⁴ The court found that *res ipsa loquitor* can apply even when there are multiple defendants and multiple causes because it “‘is not a rule which fixes the proximate cause of an injury, but only a rule of evidence allowing a permissible inference of negligence under a certain set of facts.’”⁴⁵

As to defendant Arbor, the court of appeals swiftly reversed the trial court’s entry of summary judgment in its favor.⁴⁶ Arbor did not file an appellate brief, and the trial court’s basis for granting Arbor’s summary judgment was the same as the basis for granting Davis’s summary judgment.⁴⁷ The court reasoned that because Davis’s arguments failed on appeal, reversal was likewise appropriate for Arbor’s appeal.⁴⁸

The court of appeals lastly addressed Culligan’s motion for summary judgment. Both Culligan and the Insurers agreed on appeal that *res ipsa loquitor* did not apply to Culligan.⁴⁹ However, the Insurers argued on appeal that because Culligan failed to designate any evidence in support of its motion for summary judgment, it thereby “‘failed to designate evidence negating [the Insurers’] ‘theory of ordinary negligence.’”⁵⁰ The court of appeals agreed and reversed the summary judgment in Culligan’s favor because “Culligan failed to demonstrate the absence of a genuine issue of material fact as to its causation of the insureds’ damages.”⁵¹

C. Infliction of Emotional Distress

During the survey period, Indiana appellate courts decided a few notable cases regarding negligent infliction of emotional distress. The Indiana Supreme Court answered certified questions from the United States District Court for the Southern District of Indiana in a case involving the death of a fiancée⁵² and decided on appeal a case involving passengers on an airline flight during which a French citizen on the flight smoked a cigarette and behaved erratically.⁵³ The Indiana Court of Appeals decided a case involving a collision between a truck and motorcycle, when the husband of the victim on the motorcycle witnessed the

44. *Id.* at 924-25.

45. *Id.* (quoting *N.Y., Chi. & St. Louis R.R. Co. v. Henderson*, 146 N.E.2d 531, 541 (Ind. 1958)). Davis’s last argument on appeal was basically that the Insurers had not carried their burden of proof at trial. *Id.* at 925. The court concluded that the only issue on appeal was whether there was a genuine issue of material fact as to whether Davis caused the leak that caused the damage. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 926.

50. *Id.* (quoting Brief for Appellant at 16).

51. *Id.*

52. *Smith v. Toney*, 862 N.E.2d 656, 663 (Ind. 2007).

53. *Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 1000 (Ind. 2006).

collision.⁵⁴ The court of appeals also decided a case involving insurance coverage for negligent infliction of emotional distress, but its opinion was vacated by the Indiana Supreme Court after this survey period and will therefore be discussed in detail in the next Survey issue.⁵⁵

In *Smith v. Toney*,⁵⁶ the United States District Court for the Southern District of Indiana certified the following questions to the Indiana Supreme Court:

1. Under the test elaborated in *Groves v. Taylor* for bringing a bystander claim of negligent infliction of emotional distress, are the temporal and relationship determinations regarding whether a plaintiff ‘actually witnessed or came on the scene soon after the death of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling’ issues of law or fact, or are they mixed questions of law and fact?
2. If an issue of law, is a fiancée an ‘analogous’ relationship as used in *Groves* and is ‘soon after the death of a loved one’ a matter of time alone or also of circumstances?⁵⁷

The court concluded “that (1) the temporal and relationship determinations under *Groves* are questions of law; (2) a fiancée is not ‘analogous to a spouse’ under *Groves*; and (3) ‘soon after the death of a loved one’ is a matter of both time and circumstances.”⁵⁸ The court held that although a spouse may assert claims for negligent infliction of emotional distress even when he or she did not suffer physical injury or impact, a fiancée may not assert such a claim.⁵⁹ Furthermore, the spouse must “have learned of the incident by having witnessed the injury or the immediate gruesome aftermath.”⁶⁰

In *Smith*, Amy Smith (“Smith”) drove by an auto collision that caused the death of her fiancée, Eli Welch (“Welch”).⁶¹ Welch’s vehicle collided with a tractor-trailer driven by James Toney (“Toney”), and owned by John Christner Trucking Company (“Trucking Company”).⁶² Smith did not stop at the scene, but she claimed that she saw Welch’s hand.⁶³ However, there was evidence that Welch’s body was placed in a body bag and the coroner’s vehicle prior to Smith

54. *Clancy v. Good*, 858 N.E.2d 653, 655 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 457 (Ind. 2007).

55. *State Farm Mut. Auto. Ins. Co. v. Jakupko*, 856 N.E.2d 778 (Ind. Ct. App. 2006), *aff’d*, 881 N.E.2d 654 (Ind. 2008).

56. 862 N.E.2d 656.

57. *Id.* at 657. The Indiana Supreme Court was referring to the test elaboration in *Groves v. Taylor*, 729 N.E.2d 569 (Ind. 2000).

58. *Smith*, 862 N.E.2d at 663.

59. *Id.* at 657.

60. *Id.*

61. *Id.* at 658.

62. *Id.*

63. *Id.*

driving by the scene.⁶⁴

The court found that the requirements of the parties' relationship and proximity of the plaintiff to the scene, as set forth in the *Groves* test for bystander recovery under negligent infliction of emotional distress, are questions of law.⁶⁵ The court first included a brief history of how this tort claim has evolved, starting with the impact rule, the modified impact rule, and the direct involvement rule from *Groves*.⁶⁶ The court then restated the three factors of the direct impact rule: "the severity of the victim's injury, the relationship of the plaintiff to the victim, and [the] circumstances surrounding the plaintiff's discovery of the victim's injury."⁶⁷

To support its conclusion, the court reasoned that these factors come from public policy considerations and are utilized to distinguish legitimate claims of emotional distress from illegitimate ones.⁶⁸ Therefore, the court concluded that they are issues of law for a court to resolve.⁶⁹

The court next concluded that a fiancée is not analogous to a spouse under the *Groves* test.⁷⁰ The court relied on policy reasons as set forth in out-of-state cases because it had not had the chance to consider the question previously.⁷¹ The court agreed with those courts' results, but fashioned its own rationales.⁷² First, the court found that "marriage affords a bright line and is often adopted by the legislature in defining permissible tort recovery."⁷³ Second, the court reasoned that "drawing the line at marriage for 'bystander' claims of negligent infliction of emotional distress avoids the need to explore the intimate details of a relationship that a claimant asserts is 'analogous' to marriage."⁷⁴ Third, the court reasoned that "limiting defendants' liability to spouses addresses the need to limit the array of persons to whom a negligent defendant is potentially liable."⁷⁵

Lastly, the court concluded "that the proximity requirement under *Groves* is both a matter of time and circumstances."⁷⁶ It had not previously addressed this issue and therefore looked to other cases that had for guidance.⁷⁷ In the end, the

64. *Id.*

65. *Id.*

66. *See id.* at 659-60. "*Groves* followed *Bowen v. Lumbermens Mutual Casualty Co.*, . . . , 517 N.W.2d 432 (Wis. 1994) in adopting this test." *Id.* (citing *Groves v. Taylor*, 729 N.E.2d 569, 572 (Ind. 2000)).

67. *Id.* at 660.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 660-61 & n.2.

72. *Id.* at 661.

73. *Id.*

74. *Id.*

75. *Id.* at 662.

76. *Id.*

77. *Id.* at 662-63 & n.3.

court held that in addition to the requirement that a plaintiff witness “at or immediately following the incident,” the plaintiff must also view the scene “essentially as it was at the time of the incident, the victim must be in essentially the same condition as immediately following the incident, and the claimant must not have been informed of the incident before coming upon the scene.”⁷⁸ This rule furthers two of the policy concerns of bystander claims, that the claim must be genuine and recovery must not be unduly burdensome on the defendant.⁷⁹

The Indiana Supreme Court utilized the modified impact rule when it decided another case about negligent infliction of emotional distress during the survey period, *Atlantic Coast Airlines v. Cook*.⁸⁰ In *Atlantic Coast Airlines*, the plaintiffs, Bryan and Jennifer Cook (the “Cooks”), alleged that they suffered from emotional distress due to circumstances occurring on their non-stop flight from Indianapolis to New York on a thirty-two passenger plane.⁸¹ Their flight was on February 8, 2002, five months after the tragedies of September 11, 2001, and less than two months after Richard Reid attempted to detonate explosives hidden in his shoe on a flight from Paris to Miami.⁸² Tickets were handled by Delta Airlines (“Delta”), Atlantic Coast Airlines (“Atlantic”) operated the flight, and Globe Security Services (“Globe”) provided security for the airport.⁸³ During their flight, a French citizen, Frederic Girard (“Girard”) acted erratically, smoked cigarettes, shouted in French, moved from seats often, stomped his feet, approached the cockpit of the plane, and exhibited other odd behaviors.⁸⁴

Bryan Cook (“Bryan”) enlisted the assistance of other passengers to help protect the flight and passengers from Girard.⁸⁵ Bryan never had physical contact with Girard, although he approached Girard more than once, ordering him to sit down.⁸⁶ The issues on this appeal were limited to three claims in Atlantic’s petition for transfer: “(1) the Cooks’ claim for emotional distress damages is precluded by Indiana’s modified impact rule; (2) the [c]ourt of [a]ppeals erred in reversing summary judgment in favor of Atlantic Coast on the Cooks’ breach of contract claim[,] . . . and (3) the Cooks’ negligence claim is preempted by federal law.”⁸⁷

The court affirmed the court of appeals’s decision with regard to the breach of contract and preemption claims, but did not agree with the court of appeals on “whether the trial court erred in denying Atlantic[s] motion for summary judgment on the Cooks’ claim for [negligent infliction] of emotional

78. *Id.* at 662-63.

79. *Id.* (citing Finnegan *ex rel.* Skoglund v. Wis. Patients Comp. Fund, 666 N.W.2d 797, 802-03 (Wis. 2003); Rosin v. Fort Howard Corp., 588 N.W.2d 58, 61 (Wis. Ct. App. 1998)).

80. 857 N.E.2d 989 (Ind. 2006).

81. *Id.* at 991-92.

82. *Id.* at 991.

83. *Id.*

84. *Id.* at 992.

85. *Id.*

86. *Id.*

87. *Id.* at 993.

distress.”⁸⁸ The supreme court applied Indiana’s modified impact rule and concluded that the trial court erred in denying Atlantic summary judgment on the claim.⁸⁹ The modified impact rule is as follows:

When . . . a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, . . . such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.⁹⁰

The court found that the modified impact rule retains the requirement that a direct physical impact occur, but that impact does not need to cause physical injury to the plaintiff.⁹¹ Furthermore, “the emotional trauma suffered by the plaintiff does not need to result from a physical injury caused by the impact.”⁹² The court also answered the question of what degree of impact is required:

[W]hen the courts have been satisfied that the facts of a particular case are such that the alleged mental anguish was not likely speculative, exaggerated, fictitious, or unforeseeable, then the claimant has been allowed to proceed with an emotional distress claim for damages even though the physical impact was slight, or the evidence of physical impact seemed to have been rather tenuous.⁹³

In this case, the Cooks argued that actual and constructive physical impacts occurred.⁹⁴ The Cooks listed “‘increased breathing, sweating, pulse, heart rate, adrenaline, and acuteness of the senses’” as the constructive physical impacts.⁹⁵ The court, however, declined to adopt the “constructive impact” theory proposed by the Cooks.⁹⁶ The Cooks listed breathing cigarette smoke and feeling vibrations from Girard’s stomping feet as actual physical impacts.⁹⁷ The court observed that to hold that these alleged actual physical impacts satisfy the direct physical impact requirement of the rule would “at the very least . . . stretch[] the outer limits of the impact requirement.”⁹⁸ The court also found, assuming that breathing cigarette smoke and feeling vibrations are direct physical impacts, that

88. *Id.* at 994.

89. *Id.* at 1000.

90. *Id.* at 995-96 (quoting *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)).

91. *Id.* at 996 (citing *Ross v. Chema*, 716 N.E.2d 435, 437 (Ind. 1999); *Conder v. Wood*, 716 N.E.2d 432, 435 (Ind. 1999); *Shuamber*, 579 N.E.2d at 452).

92. *Id.*

93. *Id.* (alteration in original) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1221 (Ind. 2000)).

94. *Id.* at 998.

95. *Id.* at 998-99 (quoting Brief for Opposition to Petition for Transfer at 4).

96. *Id.* at 999.

97. *Id.* at 998.

98. *Id.* at 999.

such impacts are “‘slight’ and ‘the evidence of physical impact seem[s] to have been rather tenuous.’”⁹⁹

Because the direct physical impact was slight and the evidence tenuous, the court examined the Cooks’ alleged mental anguish to make sure it was not “‘speculative, exaggerated, fictitious, or unforeseeable.’”¹⁰⁰ After reviewing the evidence and testimony, the court determined that the Cooks’ mental and emotional distress was basically transitory, occurring at the time of the events, and disappearing when the flight ended.¹⁰¹ After the flight, the court found that the Cooks were generally “‘bothered,’ ‘concerned,’ and ‘nervous,’” which the court found to be normal feelings in the world, and in particular, with regard to air travel since September 11, 2001.¹⁰² The court found the Cooks’ alleged mental anguish to be “speculative.”¹⁰³

The court held “allowing an emotional distress claim to proceed based on the Cooks’ lingering mental anguish would essentially abrogate the requirements of Indiana’s modified impact rule” because the direct impact was “slight to nonexistent” and the alleged mental anguish was “speculative.”¹⁰⁴ The court then held that in this regard the trial court should have granted Atlantic Coast’s motion for summary judgment.¹⁰⁵

A couple of weeks after the Indiana Supreme Court’s decision in *Atlantic Coast Airlines*, the court of appeals also decided a case involving the modified impact rule, *Clancy v. Goad*.¹⁰⁶ In *Clancy*, one of the issues was whether the trial court properly included a jury instruction on the modified impact rule.¹⁰⁷ Tim Clancy (“Clancy”), the defendant, argued that the modified impact rule did not apply to the case brought against him by Dianna and Robert Goad (“Dianna” and “Robert” individually, or the “Goads” collectively).¹⁰⁸ The court held that it was proper to instruct the jury about the rule because it could apply to the case.¹⁰⁹

In this case, Clancy fell asleep while driving his truck, “crossed the center-line of State Road 231,” and collided with Dianna, who was riding her motorcycle.¹¹⁰ Dianna suffered numerous severe injuries, including a severed leg

99. *Id.* (alteration in original) (quoting *Bader v. Johnson*, 732 N.E.2d 1212, 1221 (Ind. 2000)).

100. *Id.* (quoting *Bader*, 732 N.E.2d at 1221).

101. *Id.*

102. *Id.* at 1000.

103. *Id.*

104. *Id.*

105. *Id.*

106. 858 N.E.2d 653 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 957 (Ind. 2007).

107. *Id.* at 655. The other issues in *Clancy* involved whether the damages were excessive. *Id.* Dianna Goad was awarded \$10 million, and Robert Goad was awarded \$1 million. *Id.* The court ruled that they were not, but rather were “reasonable in light of the evidence presented at trial.” *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

and a two-week long coma.¹¹¹ Robert was riding his own motorcycle, but swerved to avoid a collision with Clancy.¹¹² Robert nonetheless did an emergency maneuver to stop his motorcycle quickly so he could help his wife, and suffered minor scrapes and bruises on his leg that hit the pavement.¹¹³ Clancy argued that the instruction should not have been given because the modified impact rule did not apply to Robert's claim of negligent infliction of emotional distress (for which a jury awarded him \$1 million).¹¹⁴ Clancy objected to the trial court and argued on appeal that Robert did not suffer an unintentional impact.¹¹⁵ Additionally, in his appeal, Clancy argued that Robert failed to present evidence that Clancy was negligent to Robert "*personally*."¹¹⁶

The court of appeals first addressed Clancy's latter argument. It held that Clancy waived the argument because he did not object on this ground to the trial court.¹¹⁷ Even if Clancy had not waived the argument, it would have failed because the jury found Clancy was negligent to Dianna, Clancy did not object to this finding, and the finding "provided Robert with proof of negligence in the tort *underlying* his negligent infliction claim and, consequently, with an adequate foundation upon which to base his recovery."¹¹⁸

Before ruling on Clancy's argument that Robert did not suffer an impact, the court examined Robert's involvement in the accident because

"[D]irect impact" is properly understood as the requisite measure of "direct involvement" in the incident giving rise to the emotional trauma. Viewed in this context, we find that *it matters little how the physical impact occurs, so long as that impact arises from the plaintiff's direct involvement in the tortfeasor's negligent conduct*.¹¹⁹

Clancy argued that Robert's maneuver was deliberate, and the only impact on Robert was "between his feet and the highway."¹²⁰ Therefore, Clancy argued, the impact on Robert was not a direct impact under the modified impact rule.¹²¹ Robert, however, argued that even though he voluntarily stopped his motorcycle causing his leg to scrape the pavement, that impact was a result of his direct involvement in the collision between Clancy and Dianna and therefore meets the direct impact requirement of the modified impact rule.¹²²

The court of appeals agreed with Robert and found that the evidence

111. *Id.* at 655-56.

112. *Id.* at 655.

113. *Id.* at 656.

114. *Id.*

115. *Id.* at 660.

116. *Id.* at 660-61.

117. *Id.* at 661.

118. *Id.*

119. *Id.* at 662 (quoting *Conder v. Wood*, 716 N.E.2d 432, 435 (Ind. 1999)).

120. *Id.* (quoting Appellant's Reply Brief at 10).

121. *Id.*

122. *Id.* at 663.

presented “demonstrates a sufficient level of involvement in the tortfeasor’s negligent conduct to support a trial court’s instruction on the modified impact rule.”¹²³ The court found “that it was proper for the trial court to instruct the jury on the modified impact rule as a potential avenue by which Robert could be entitled to recover from Clancy.”¹²⁴

II. LEGAL MALPRACTICE

A. Legal Malpractice Claims Not Assignable

In *State Farm Mutual Automobile Insurance Co. v. Estep*,¹²⁵ the Indiana Supreme Court reaffirmed its previous holding that legal malpractice claims are not assignable.¹²⁶ This case involved a general assignment pursuant to which the assignee sued an attorney for “negligence and breach of duty to defend.”¹²⁷ The court concluded that the assignment was invalid,¹²⁸ basing its decision upon the policy concerns of “‘preserv[ing] the sanctity of the client-lawyer relationship” and avoiding ultimate “‘disreputable public role reversal.”¹²⁹

B. Dual Representation

Another notable legal malpractice case during the survey period was *Van Kirk v. Miller*,¹³⁰ decided by the Indiana Court of Appeals. This case involved dual representation and a signed conflict waiver.¹³¹

Under Indiana law, the elements of legal malpractice are: (1) employment of an attorney, which creates a duty to the client; (2) failure of the attorney to exercise ordinary skill and knowledge (breach of the duty); and (3) that such negligence was the proximate cause of (4) damage to the plaintiff.¹³²

A defendant need only negate one element of a legal malpractice claim to avoid liability.¹³³

The court of appeals affirmed the trial court’s grant of summary judgment in favor of the defendants, Ward Miller and the law firm of More, Miller, Yates &

123. *Id.*

124. *Id.*

125. 873 N.E.2d 1021 (Ind. 2007).

126. *Id.* at 1025-26 (citing *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991)).

127. *Id.* at 1026.

128. *Id.*

129. *Id.* at 1025 (quoting *Picadilly*, 582 N.E.2d at 342).

130. 869 N.E.2d 534 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 218 (Ind. 2007).

131. *Id.* at 536.

132. *Id.* at 540-41 (quoting *Clary v. Lite Machs. Corp.*, 850 N.E.2d 423, 430 (Ind. Ct. App. 2006)).

133. *Id.* at 541 (citing *Legacy Healthcare, Inc. v. Barnes & Thornburg*, 837 N.E.2d 619, 624 (Ind. Ct. App. 2005)).

Tracey ("Miller"), and against the plaintiff, Thomas Van Kirk ("Van Kirk").¹³⁴ The court first addressed the conflict waiver. In this case, the parties agreed that Miller's dual representation of Van Kirk and Mark Summers ("Summers") (a buyer and seller) was "a concurrent conflict of interest that triggered Indiana Professional Conduct Rule 1.7."¹³⁵ The disagreement, however, was "whether that conflict was consentable . . . and whether Van Kirk gave informed consent when he signed the conflict waiver."¹³⁶

The court of appeals concluded that the conflict of interest was consentable and Miller could represent both parties "if he obtained a valid conflict waiver for the dual representation because Van Kirk's and Summers's 'interests [were] 'generally aligned . . . even though there [were] some difference[s],'"¹³⁷ and Miller was hired to merely "draft the agreement memorializing the terms that Summers and Van Kirk had independently negotiated."¹³⁸ The court also concluded that the conflict waiver was valid because Van Kirk was adequately informed by Miller of the dual representation and concurrent conflict of interest.¹³⁹

The court next addressed Miller's alleged breach of duty, a requirement of a successful claim for legal malpractice.¹⁴⁰ "In Indiana, an attorney is generally required 'to exercise ordinary skill and knowledge.'"¹⁴¹ Van Kirk alleged that Miller breached his duty by favoring Summers during his dual representation and also by representing Summers after Van Kirk terminated his attorney-client relationship with Miller.¹⁴²

The court first found that the facts were not in dispute, thereby only questions of law remained.¹⁴³ The court also dismissed Van Kirk's argument that Miller breached his duty to Van Kirk by including a contingency provision in the agreement between Van Kirk and Summers, because in fact, Van Kirk requested the inclusion of that provision.¹⁴⁴ The court also dismissed Van Kirk's argument that Miller breached his duty by favoring Summers during the dual representation because there was no evidence presented to support the contention.¹⁴⁵

Lastly, the court concluded that Miller did not breach his duty to Van Kirk despite his continued representation of Summers after Van Kirk ended his attorney-client relationship with Miller, even though Miller represented Summers

134. *Id.* at 536.

135. *Id.* at 541.

136. *Id.*

137. *Id.* at 542 (quoting IND. PROF'L CONDUCT R. 1.7 cmt. 28).

138. *Id.*

139. *Id.* at 543-44.

140. *Id.* at 544 (citing *Clary v. Lite Machs. Corp.*, 850 N.E.2d 423, 430 (Ind. Ct. App. 2006)).

141. *Id.* (quoting *Rice v. Strunk*, 670 N.E.2d 1280, 1283-84 (Ind. 1996)).

142. *Id.*

143. *Id.*

144. *Id.* at 545.

145. *Id.*

in the sale of the property at issue in the Van Kirk and Summers agreement.¹⁴⁶ The court reasoned that Miller was hired by Van Kirk and Summers “to represent them in ‘the preparation of a proposed sale and closing documents’” and that it was not automatic legal malpractice on Miller’s part because the deal was not closed.¹⁴⁷ The court affirmed the trial court’s grant of summary judgment in favor of Miller.¹⁴⁸

III. MEDICAL MALPRACTICE

Several medical malpractice cases other than those surveyed herein were decided during the survey period, and at least one case decided by the Indiana Court of Appeals during the survey period was affirmed in part and reversed in part by the Indiana Supreme Court outside of the period.¹⁴⁹ Those cases not surveyed in detail herein relate to the constitutionality of the statute of limitations in the Indiana Medical Malpractice Act¹⁵⁰ and to claims against Indiana’s Patient Compensation Fund.¹⁵¹

A. Defendant Identity Confidentiality Statute

The Indiana Supreme Court decided a case of first impression in *Kho v. Pennington*,¹⁵² when it concluded that the trial court erred in granting summary judgment to defendants Ruby Miller (“Miller”), Deborah Pennington, and Findling Garau Germano & Pennington, P.C. (“Pennington”) on plaintiff Eusebio

146. *Id.* at 546.

147. *Id.* The court declined to develop arguments for the parties related to Indiana Professional Conduct Rule 1.9, which provides that attorneys owe a continued duty to former clients because none were raised in the appeal. *Id.* at 546 n.8.

148. *Id.* at 546.

149. *See* Ho v. Frye, 865 N.E.2d 632 (Ind. Ct. App. 2007), *aff’d in part, rev’d in part*, 880 N.E.2d 1192 (Ind. 2008).

150. Herron v. Anigbo, 866 N.E.2d 842 (Ind. Ct. App. 2007) (holding that statute of limitations in the Indiana Medical Malpractice Act is unconstitutional as applied to plaintiff quadriplegic); Brinkman v. Bueter, 856 N.E.2d 1231 (Ind. Ct. App. 2006) (statute of limitations in the Indiana Medical Malpractice Act is unconstitutional as applied to plaintiff with preeclampsia and eclampsia), *rev’d on other grounds*, 879 N.E.2d 549 (Ind. 2008).

151. Two similar cases were handed down on March 16, 2007: *Indiana Patient’s Compensation Fund v. Winkle*, 863 N.E.2d 1 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007) and *Indiana Patient’s Compensation Fund v. Butcher*, 863 N.E.2d 11 (Ind. Ct. App. 2007). In *Winkle*, the court of appeals held that “the Winkles’ unborn child is not a ‘patient’ pursuant to the [Medical Malpractice] Act and because [the Winkles] therefore have no one from whom their negligent infliction of emotional distress claims can derive, they are not entitled to separate statutory caps for their emotional damages.” *Winkle*, 863 N.E.2d at 11. In *Butcher*, even though the Butchers’ unborn child was a victim for purposes of the Medical Malpractice Act, the court held that because the Butchers’ deceased child, Samuel, was the only actual victim of malpractice, the Butchers’ “recovery is limited to one \$1,250,000 cap.” *Butcher*, 863 N.E.2d at 19-20.

152. 875 N.E.2d 208 (Ind. 2007).

Kho, M.D.'s ("Kho") claim of statutory negligence.¹⁵³ Kho's claim of statutory negligence was based upon the defendant identity confidentiality statute, part of the Indiana Medical Malpractice Act, found at Indiana Code section 34-18-8-7.¹⁵⁴ The court held "that the doctor's claim against the malpractice claimant and her attorneys for violation of the statutory defendant identity confidentiality provision presents a cognizable negligence action for violation of an express statutory duty."¹⁵⁵

In *Kho*, Miller, as personal representative of the Estate of Tracy Merle Lee ("Lee"), filed a complaint for medical negligence with the Indiana Department of Insurance, as required by the Indiana Medical Malpractice Act.¹⁵⁶ However, prior to a determination by a medical review panel, Miller filed a complaint with the Scott Circuit Court.¹⁵⁷ Kho filed a motion for summary judgment, claiming he did not provide medical services to Lee, which prompted Miller and Pennington to voluntarily dismiss their state claim against Kho.¹⁵⁸ Kho then filed a complaint against Miller and Pennington for falsely naming him in the malpractice lawsuit.¹⁵⁹ The trial court granted summary judgment against Kho, which the Indiana Court of Appeals affirmed.¹⁶⁰ The Indiana Supreme Court granted transfer to address "whether violation of the defendant identity confidentiality provision of Indiana Code [section] 34-18-8-7 in the Indiana Medical Malpractice Act may give rise to an action for damages."¹⁶¹

The Indiana Medical Malpractice Act requires that certain claims be considered first by a medical review panel before an action should be filed in state court.¹⁶² Nevertheless, Indiana Code section 34-18-8-7 provides an exception to the rule, which includes the following restriction: "[the] complaint filed in court *may not contain any information that would allow a third party to identify the defendant[.]*"¹⁶³ In *Kho*, the defendant was easily identifiable from Miller's state court complaint.¹⁶⁴

To reach its conclusion that Kho filed an actionable claim against Miller and her attorneys for naming him in the state court malpractice action and its order that summary judgment was erroneously granted in favor of Miller and Pennington, the Indiana Supreme Court examined the "long and continuous history" in Indiana courts that "recogniz[es] negligence actions for statutory

153. *Id.* at 216.

154. *Id.*

155. *Id.*

156. *Id.* at 209 & n.1 (citing IND. CODE §§ 34-18-8-4, 34-18-10-1 to -26 (1998)).

157. *Id.* at 209-10.

158. *Id.* at 210.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 211 (citing IND. CODE § 34-18-8-4 (2004)).

163. *Id.* (quoting IND. CODE § 34-18-8-7(a)(1) (2004)).

164. *Id.*

violations.”¹⁶⁵ The court found additional support in Restatement Second of Torts sections 285 and 286 (1965), and “authoritative treatises.”¹⁶⁶

B. “Increased Risk of Harm” Standard

In *Wolfe v. Estate of Custer ex rel. Custer*,¹⁶⁷ the Indiana Court of Appeals affirmed the trial court’s denial of defendant Richard Wolfe, D.O.’s (“Wolfe”) motion to correct error, which he filed after the trial court denied his motion for judgment on the evidence.¹⁶⁸ The court of appeals entered judgment on the jury verdict in favor of the plaintiff, Estate of Custer (“Custer”), for \$432,000.¹⁶⁹ Wolfe essentially argued on appeal that there was not sufficient evidence to support the jury’s verdict or the damages awarded.¹⁷⁰

More specifically, Wolfe argued that there was insufficient evidence of proximate cause

because the alleged increased risk of harm was “unquantified” and was not shown to be a “substantial factor” in [plaintiff’s] damages and that the evidence presented regarding damages did “not establish that those bills [we]re reasonable and necessary” or “that they were proximately caused by anything that Dr. Wolfe did or did not do.”¹⁷¹

The court examined the history of the “increased risk of harm” standard as adopted by the Indiana Supreme Court from Restatement (Second) of Torts section 323 in *Mayhue v. Sparkman*¹⁷² and as applied to certain medical malpractice cases.¹⁷³ Both parties agreed that the increased risk of harm standard applied in the case, which requires that a “plaintiff must demonstrate that: (1) the doctor was negligent; (2) the negligent act increased the risk of harm; and (3) the ‘negligence was a substantial factor in causing the plaintiff’s harm.’”¹⁷⁴

The court rejected Wolfe’s first argument that Custer failed to prove that the increased risk of harm caused by Wolfe was a substantial factor in causing the harm suffered by Custer.¹⁷⁵ The court quoted the Indiana Supreme Court’s finding that “once the plaintiff proves negligence and an increase in the risk of harm, the jury is permitted to decide whether the medical malpractice was a

165. *Id.* at 212 (citing, e.g., *City of Indianapolis v. Garman*, 848 N.E.2d 1087, 1088 (Ind. 2006)).

166. *Id.* at 213 (citing DAN DOBBS, *THE LAW OF TORTS* §§ 133-142 (2001); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 190-205 (4th ed. 1971)).

167. 867 N.E.2d 589 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007).

168. *Id.* at 602.

169. *Id.*

170. *Id.* at 598.

171. *Id.* at 594-95 (quoting Transcript of Record at 629-30).

172. *Id.* at 596 (citing *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1388 (Ind. 1995)).

173. *Id.*

174. *Id.* at 597 (quoting *Mayhue*, 653 N.E.2d at 1388).

175. *Id.* at 598.

substantial factor in causing the harm suffered by the plaintiff,”¹⁷⁶ and concluded that Custer presented sufficient evidence from which the jury could infer that Wolfe’s negligence was a substantial factor in the harm.¹⁷⁷

The court also rejected Wolfe’s second argument that Custer’s evidence was faulty because it failed to quantify the increased risk of harm.¹⁷⁸ The court found that Custer did in fact present evidence in the form of expert testimony quantifying the risk of harm¹⁷⁹ and stated in a footnote that “quantification of the increased risk is likely not required in order for a plaintiff to prove causation.”¹⁸⁰

Likewise, the court found in favor of Custer as to Wolfe’s final arguments that the medical bills presented by Custer were not reasonable or necessary, nor causally related to Wolfe’s acts or omissions.¹⁸¹ The court reached its conclusion by reasoning that Wolfe was required to present evidence to dispute the expenses presented as evidence by Custer or risk the inference that the “medical bills are admissible to show that the medical services performed were necessary.”¹⁸² The court also found that Wolfe’s argument as to causation failed “[b]ecause the application of [Restatement (Second) of Torts section] 323 replaces the requirement of showing a causal relationship under the traditional proximate cause analysis.”¹⁸³

C. Wrongful Death or Survival Act?

The court of appeals addressed another case of first impression in *Atterholt v. Robinson*,¹⁸⁴ in which it decided that the Indiana Patient Compensation Fund (“Fund”) “should have been allowed to contest the theory of recovery And because recovery under the [wrongful death statute] or the Survival Act hinges on whether the victim dies as a direct result of the tortfeasor’s actions, the Fund should have been allowed to present evidence regarding the cause of . . . death.”¹⁸⁵ Claimants are allowed to plead a wrongful death action or, alternatively, a survival action, but tortfeasors can only be held liable for one, not both.¹⁸⁶

The Fund argued that the Estate of Irene Gray (“Robinson”) could only recover excess damages pursuant to the wrongful death statute (“AWDS”), but

176. *Id.* (quoting *Mayhue*, 653 N.E.2d at 1388).

177. *Id.*

178. *Id.* at 599.

179. *Id.*

180. *Id.* at 599 n.10 (citing *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467, 475 (Okla. 1987)).

181. *Id.* at 601.

182. *Id.* (quoting *Wilkinson v. Swafford*, 811 N.E.2d 374, 387 (Ind. Ct. App. 2004)).

183. *Id.*

184. 872 N.E.2d 633 (Ind. Ct. App. 2007).

185. *Id.* at 643.

186. *Id.* at 640 (citing *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702, 705 (Ind. Ct. App. 1999)).

Robinson argued that she could recover “damages pursuant to the Survival Act.”¹⁸⁷ Each of their arguments was based upon the amount of recovery, and each argued the theory most economically beneficial to themselves.¹⁸⁸

The court first held that “because the underlying settlement [agreement between Robinson and the healthcare provider] did not specify whether it awarded damages pursuant to either the AWDS or the Survival Act, the Fund should have been allowed to advocate for the proper theory of recovery.”¹⁸⁹ However, the court also found that despite the trial court’s pretrial order precluding admission of cause of death to support its arguments about the proper recovery theory, “the Fund admitted at oral argument that it proffered all of its evidence regarding the proper theory of compensation.”¹⁹⁰ Therefore, the trial court’s error in issuing the pretrial order was harmless.¹⁹¹ Lastly, the court held that there was sufficient evidence to support the trial court’s findings of fact supporting its decision to award damages pursuant to the Survival Act,¹⁹² and the amount of damages awarded was “within the scope of damages” and therefore not excessive.¹⁹³

IV. PREMISES LIABILITY

The premises liability cases decided during the survey period addressed issues related to visitor status¹⁹⁴ and falls.¹⁹⁵ The facts of these cases involve gravel,¹⁹⁶ snow and ice,¹⁹⁷ mail carriers,¹⁹⁸ and an unstable wooden step.¹⁹⁹ The first case in this section, decided by the Indiana Court of Appeals, addressed an issue of first impression, when it was faced with defining the duty of a real estate broker to a prospective buyer when the real estate broker shows a house.²⁰⁰

In *Masick v. McColly*, Christine Masick (“Masick”) suffered injuries when she fell at a residential construction site, which residence and property was owned by Hollendale Builders (“Hollendale”).²⁰¹ At the time of her fall, Masick

187. *Id.* at 641.

188. *Id.*

189. *Id.* at 644.

190. *Id.* at 644-45.

191. *Id.* at 645.

192. *Id.*

193. *Id.* at 646-47.

194. *Masick v. McColley Realtors, Inc.*, 858 N.E.2d 682 (Ind. Ct. App. 2006).

195. *Gilpin v. Ivy Tech State Coll.*, 864 N.E.2d 399 (Ind. Ct. App. 2007); *Denison Parking, Inc. v. Davis*, 861 N.E.2d 1276 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007); *Masick*, 858 N.E.2d 682; *Olds v. Noel*, 857 N.E.2d 1041 (Ind. Ct. App. 2006).

196. *See Gilpin*, 864 N.E.2d 399.

197. *See Denison Parking, Inc.*, 861 N.E.2d 1276.

198. *See Olds*, 857 N.E.2d 1041.

199. *See Masick*, 858 N.E.2d 682.

200. *See id.*

201. *Id.* at 684.

was with a real estate agent from McColly Realtors (“McColly”), which had been hired by Hollendale.²⁰² Masick fell when she stepped onto a wooden step in the garage.²⁰³ The step was built and owned by Hollendale and was moved between houses during construction projects.²⁰⁴ “[T]he step was not attached to anything.”²⁰⁵ Also present in the residence at the time of Masick’s fall was an employee of Saxon Drywall (“Saxon”).²⁰⁶ Masick sued McColly and Saxon, claiming that both companies were negligent for not warning her of the dangerous step.²⁰⁷

The court of appeals first affirmed the trial court’s grant of summary judgment in favor of Saxon.²⁰⁸ The court reasoned that “Saxon did not have sufficient control over the step to subject it to liability for failure to warn Masick about it.”²⁰⁹ Saxon was merely present at the residence, and its employees merely used the step themselves.²¹⁰ “Saxon did not construct, design, own, or maintain the step.”²¹¹

The court of appeals next concluded that McColly also did not have sufficient control over the premises, pursuant to premises liability standards, to give rise to a duty to warn Masick of the dangerous step.²¹² However, the court reversed the trial court’s grant of summary judgment in favor of McColly when it held that real estate brokers, like prospective landlords, have a duty to warn prospective buyers of hidden defects known to the broker, but not known to the tenant or buyer.²¹³

The court of appeals found that the scope and nature of a real estate broker’s duty to a prospective buyer under the facts of this case presented a case of first impression.²¹⁴ In reaching its decision, the court “decline[d] to impose a duty on real estate brokers unless they have control over the premises sufficient to independently give rise to a duty to warn under recognized premises liability principles.”²¹⁵ This was the same reasoning the court used with regard to Saxon.²¹⁶

However, the court then looked more specifically at policy arguments made

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 684-85.

208. *Id.* at 687.

209. *Id.* at 685.

210. *Id.* at 686.

211. *Id.*

212. *Id.* at 692.

213. *Id.*

214. *Id.* at 687.

215. *Id.* at 688.

216. *See supra* notes 209, 211 and accompanying text.

by the parties and set forth in *Hopkins v. Fox & Lazo Realtors*.²¹⁷ The court of appeals agreed with the dissent in *Hopkins*:

Because of the newly-created duty to inspect and warn, brokers forced to defray the cost of the additional liability insurance will simply add costs to the commission. Moreover, as the majority recognizes, the broker still would retain the right of either contribution or indemnification from the homeowner. Thus, in the end, the homeowner will pay even more to insure against injuries that might occur in the home, while the brokers will have no more incentive to inspect and warn than they did before today's decision.

In addition, the smart homeowner, saddled with new costs will simply increase the asking price for the house. Therefore, the potential buyer will have to pay more for a house, which has had costs added to the purchase price, all in the name of the buyer's protection.

Rather than serving the public, the majority's decision will add extra layers of litigation, paperwork, and cost to the already complex and expensive process of selling and buying a house.²¹⁸

The court, while declining to impose a duty on the real estate broker to inspect the house before showing it, agreed that "a broker is obliged to warn a prospective buyer of a latent defect in the premises when the broker is aware of it."²¹⁹ The court reversed the trial court with regard to McColly because it found there was "a genuine issue of material fact as to whether such a duty arose and whether the [real estate broker] breached it."²²⁰

Earlier in 2007, the court of appeals decided the fairly straightforward premises liability case *Gilpin v. Ivy Tech State College*,²²¹ which involved a slip and fall due to gravel.²²² In *Gilpin*, the court affirmed the grant of summary judgment in favor of the defendant Ivy Tech State College ("Ivy Tech").²²³ The court concluded that Paul Gilpin ("Gilpin") "was a licensee when he slipped on gravel and fell in the street while on the way to restrooms" at Ivy Tech.²²⁴ Additionally, the court concluded that "Gilpin was aware of the gravel before he fell and, consequently, the gravel was not a latent danger about which Ivy Tech should have warned Gilpin."²²⁵

The court first examined Gilpin's status when he entered Ivy Tech's property because determining a person's visitor status is the first step in resolving a

217. *Masick*, 858 N.E.2d at 689-91 (citing *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1119-20 (N.J. 1993)).

218. *Id.* at 690-91 (quoting *Hopkins*, 625 A.2d at 1123 (Garibaldi, J., dissenting)).

219. *Id.* at 691.

220. *Id.*

221. 864 N.E.2d 399 (Ind. Ct. App. 2007).

222. *Id.* at 400.

223. *Id.*

224. *Id.*

225. *Id.*

premises liability case.²²⁶ When a person enters property of another, he is an invitee, licensee, or trespasser.²²⁷ The duty owed to the visitor by the landowner is defined by the visitor's status.²²⁸ "[A]n invitee is a person who is invited to enter or to remain on another's land whereas a licensee is privileged to enter or remain on the land by virtue of permission or sufferance."²²⁹

The court agreed with Ivy Tech and determined that Gilpin was a licensee when he entered Ivy Tech's land.²³⁰ The court examined the evidence in a light favorable to Gilpin and determined that no reasonable person could conclude that Gilpin was invited to enter the land by Ivy Tech to use its public restrooms.²³¹ The court found no evidence that "Ivy Tech encouraged, desired, induced, or expected Gilpin . . . to use its restrooms[,] Gilpin . . . plann[ed] to pursue his own educational objectives," or that Gilpin entered the Ivy Tech building to speak with Ivy Tech personnel regarding his son for any reason.²³²

The duty owed to a licensee is "to refrain from willfully or wantonly injuring" the licensee "or acting in a manner to increase his peril."²³³ This duty includes "the duty to warn a licensee of any latent danger on the premises of which the landowner has knowledge,"²³⁴ with "latent defined as concealed or dormant."²³⁵ The court found that Gilpin did not claim that Ivy Tech acted willfully or wantonly, and then concluded that Ivy Tech had no duty to warn Gilpin of the gravel because it was not a latent danger.²³⁶ Gilpin knew of the gravel before he fell.²³⁷

Another "slip and fall" case decided by the Indiana Court of Appeals during the survey period was *Denison Parking, Inc. v. Davis*.²³⁸ Also very straightforward, the issue in this case was whether an owner of property abutting a public sidewalk has a duty to a pedestrian to keep the sidewalks in a reasonably safe condition.²³⁹ The court concluded that the property owner does not.²⁴⁰ In *Denison Parking*, Barbara Davis was walking on a sidewalk abutting Market Square Arena when she slipped on ice and fell.²⁴¹

226. *Id.* at 401 (citing *Rhoades v. Heritage Invs., LLC*, 839 N.E.2d 788, 791 (Ind. Ct. App. 2005)).

227. *Id.* (citing *Rhoades*, 839 N.E.2d at 791).

228. *Id.* (citing *Rhoades*, 839 N.E.2d at 791).

229. *Id.* at 402 (alteration in original) (quoting *Rhoades*, 839 N.E.2d at 792).

230. *Id.* at 403.

231. *Id.* at 402.

232. *Id.*

233. *Id.* at 403 (citing *Rhoades*, 839 N.E.2d at 791).

234. *Id.* (quoting *Rhoades*, 839 N.E.2d at 791).

235. *Id.* (citing BLACK'S LAW DICTIONARY 887 (7th ed. 1999)).

236. *Id.*

237. *Id.*

238. 861 N.E.2d 1276 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007).

239. *Id.* at 1277.

240. *Id.*

241. *Id.* at 1277-78.

The court found generally that defendant property owners can be held liable only if they create more dangerous conditions on abutting public sidewalks and “if [the] plaintiff’s injuries are ‘directly attributable to that condition,’” or if the property owner creates artificial conditions “that increase risk and proximately cause injury to persons using those sidewalks.”²⁴²

The court continued and determined that even if it had analyzed the case and facts under the Restatement (Second) of Torts section 342(A), which was used by the court in *Webb v. Jarvis*,²⁴³ to determine whether Denison Parking owed a duty to Davis, Denison Parking would still not be liable.²⁴⁴ Pursuant to *Webb*, a court looks to three factors, the third of which is a public policy balancing test.²⁴⁵ The *Denison Parking* court found that a separate analysis “would fail the ‘balancing’ test set forth in *Webb*, in favor of the third ‘public policy’ prong.”²⁴⁶ The court found that society favors encouraging private parties to conduct snow removal.²⁴⁷

In the end, the *Denison Parking* court held that Denison Parking owed no common law duty to Davis, by assumption or otherwise, and Denison Parking did not owe Davis a statutory duty because municipal codes are not enacted to protect individuals, but rather, municipalities.²⁴⁸ The trial court’s denial of Denison Parking’s motion for summary judgment was reversed, and the case remanded.²⁴⁹

In *Olds v. Noel*,²⁵⁰ the court of appeals addressed issues related to injuries sustained after a mail carrier slipped and fell on snow and ice along a private sidewalk of a single-family residential dwelling that was being rented at the time.²⁵¹ The court of appeals affirmed the trial court’s grant of summary judgment in favor of the defendants, Steven and Rita Noel (“Noels”), and against the plaintiff, James H.S. Olds, III (“Olds”).²⁵²

Olds argued that summary judgment was inappropriate because the Noels, as the homeowners and landlords, owed Olds a duty to clear the sidewalk upon which Olds fell.²⁵³ The court cited the general rule regarding maintenance and conditions of real property: “whether a duty is owed depends primarily upon whether the defendant was in control of the premises when the accident

242. *Id.* at 1280-81 (quoting *Lawson v. Lafayette Home Hosp., Inc.* 760 N.E.2d 1126, 1130 (Ind. Ct. App. 2002)).

243. 575 N.E.2d 992, 995 (Ind. 1991).

244. *Denison Parking*, 861 N.E.2d at 1280.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 1280-81.

249. *Id.* at 1281-82.

250. 857 N.E.2d 1041 (Ind. Ct. App. 2006).

251. *Id.* at 1042.

252. *Id.*

253. *Id.*

occurred.”²⁵⁴ In the landlord-tenant context, Indiana courts have held: “‘As a general rule, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property.’”²⁵⁵

Olds argued that a “well-recognized exception” to the general rule should apply to his case, that landlords have a duty of reasonable care to maintain common areas over which the landlord has retained control.²⁵⁶ The court found, however, that “Indiana courts to date have recognized common areas on rental properties only in apartment complexes, duplexes, or other multi-unit properties where tenants lease property subject to leases specific to each individual rental unit.”²⁵⁷ This case involved “an undivided, single-family dwelling.”²⁵⁸

Furthermore, the Noels specifically did not retain control over the sidewalks, pursuant to their lease agreement with the tenants, and there was one common lease signed on the same date by the tenants.²⁵⁹ The court declined to accept Olds’s argument that because the Noels reserved a right of entry to the property (a common lease provision), they never transferred complete control of the premises to the tenants.²⁶⁰ The court lastly declined to accept Olds’s argument that public policy warrants expanding the exception to the general rule to the facts of his case.²⁶¹ The court reminded Olds that he did not pursue the legal remedy available to him in this case, to sue the tenants who were in control and possession of the premises at the time of the fall.²⁶²

V. INDIANA TORT CLAIMS ACT

There were at least two notable Indiana Tort Claims Act (“ITCA”) cases decided during the survey period. One from each of the appellate courts will be surveyed below. The Indiana Supreme Court decided a case based upon a section of the ITCA that provides immunity based upon losses resulting from temporary conditions caused by weather.²⁶³ The Indiana Court of Appeals decided a case

254. *Id.* at 1043-44 (quoting *Rhodes v. Wright*, 805 N.E.2d 382, 385 (Ind. 2004)).

255. *Id.* at 1044 (quoting *Pitcock v. Worldwide Recycling, Inc.*, 582 N.E.2d 412, 414 (Ind. Ct. App. 1991)).

256. *Id.* (citing *Rossow v. Jones*, 404 N.E.2d 12, 14 (Ind. Ct. App. 1980)).

257. *Id.* (citing *Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc.*, 820 N.E.2d 158 (Ind. Ct. App. 2005) (apartment complexes); *Dawson v. Long*, 546 N.E.2d 1265 (Ind. Ct. App. 1998) (duplex); *Flott v. Cates*, 528 N.E.2d 847 (Ind. Ct. App. 1998) (home divided into three apartments)).

258. *Id.*

259. *Id.* at 1044-45.

260. *Id.* at 1045-46.

261. *Id.* at 1046-57.

262. *Id.* at 1047.

263. *See Hochstetler v. Elkhart County Highway Dep’t*, 868 N.E.2d 425 (Ind. 2007).

involving a claim of an incarcerated defendant against prison officers.²⁶⁴

In *Hochstetler v. Elkhart County Highway Department*,²⁶⁵ the Indiana Supreme Court affirmed a trial court ruling that granted summary judgment for various county entities on plaintiff Marvin Hochstetler's ("Hochstetler") negligence suit.²⁶⁶ Hochstetler sued the highway department, county commissioners, and county sheriff claiming the entities negligently and carelessly maintained the county road upon which Hochstetler wrecked his motorcycle into a tree that had fallen into a county road after a storm the night before.²⁶⁷

The Indiana Supreme Court found that even though "more recent law established through the Indiana Tort Claims Act recognizes that state and local governments may have tort responsibility for damages flowing from negligence," state and local governments may be immune from the negligence under certain circumstances.²⁶⁸ The applicable provision of the ITCA in *Hochstetler* was Indiana Code section 34-13-3-3(3), which "creates immunity for losses resulting from '[t]he temporary condition of a public thoroughfare . . . that results from weather.'" ²⁶⁹

The court examined previous case law construing the applicable provision of the ITCA and found that it previously determined that "immunity under this section contains two key concepts[.]"²⁷⁰ The first concept is that the condition must have truly been "caused [by] weather" as distinguished from "poor inspection, design, or maintenance."²⁷¹ The second concept is that the condition must be "temporary."²⁷² In affirming the trial court and thereby dismissing the negligence claims against the county entities based upon the ITCA, the Indiana Supreme Court reasoned that in this situation, the storm caused many trees to fall onto roadways and the highway crews worked to clear the trees for hours.²⁷³

In *Smith v. Indiana Department of Correction*,²⁷⁴ Eric Smith ("Smith"), the incarcerated plaintiff, filed a negligence claim against prison officers based upon the manner in which the officers allegedly treated Smith during a cell extraction.²⁷⁵ The cell extraction was ordered because Smith refused to obey orders of the officers at the same time that other prisoners were purposefully

264. See *Smith v. Ind. Dep't of Corr.*, 871 N.E.2d 975 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 220 (Ind. 2007), *cert. denied*, 128 S. Ct. 1493 (2008).

265. 868 N.E.2d 425.

266. *Id.* at 426.

267. *Id.*

268. *Id.* (citing IND. CODE ANN. §§ 34-13-3-1 to -25 (West 2007)).

269. *Id.* (alteration and omission in original) (quoting IND. CODE ANN. § 34-13-3-3(3)).

270. *Id.* (citing *Catt v. Bd. of Comm'rs of Knox County*, 779 N.E.2d 1, 4-6 (Ind. 2002)).

271. *Id.* at 426-27 (citing *Catt*, 779 N.E.2d at 4).

272. *Id.* at 427 (citing *Catt*, 779 N.E.2d at 6).

273. *Id.*

274. 871 N.E.2d 975 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 220 (Ind. 2007), *cert. denied*, 128 S. Ct. 1493 (2008).

275. *Id.* at 980-81.

flooding their cells.²⁷⁶ The court held that because “[e]nforcing discipline and maintaining prison security is clearly within the prison officers’ scope of employment,”²⁷⁷ Smith cannot prevail against the officers individually because they “are shielded from liability in their official capacity under the Indiana Tort Claims Act.”²⁷⁸

VI. BUSINESS TORTS

A. *Fraud and Misrepresentation*

The case of *Benge v. Miller*,²⁷⁹ decided by the Indiana Court of Appeals during the survey period, stands for the proposition that the causes of action for fraud, constructive fraud, and home improvement fraud are distinct causes of action and one may recover for home improvement fraud while losing its claim for fraud or constructive fraud.²⁸⁰ In this case, the defendant argued that the trial court erred when it entered judgment *for* the plaintiff on the home improvement fraud count while at the same time entered judgment *against* the plaintiff on the fraud and constructive fraud counts.²⁸¹

The court of appeals held that the trial court did not err in this respect and found that to prove fraud and constructive fraud a “plaintiff must show a material misrepresentation of a past or existing fact” and reliance on the material misrepresentations.²⁸² On the other hand, to prove home improvement fraud, a plaintiff must show only one of the following: “that the home improvement supplier either [(1)] misrepresented a material fact or promised performance that he did not intend to perform, or [(2)] used or employed deception to cause the plaintiff to enter into the contract, or [(3)] entered into an unconscionable contract.”²⁸³ Furthermore, unlike with fraud and constructive fraud, there is “no reliance requirement in the home improvement fraud statute.”²⁸⁴

B. *Commercial Interference & Malicious Prosecution*

The Indiana Court of Appeals addressed two intentional torts in *Government Payment Service, Inc. v. Ace Bail Bonds*.²⁸⁵ First, the court reversed the trial court and held that there was no intentional interference with business relationships by Government Payment Service, Inc. (“GPS”) as against Ace Bail Bonds, American Bail Bond Company, Bertholet Bail Bond, and Express Bail

276. *Id.* at 986.

277. *Id.*

278. *Id.* (citing IND. CODE §§ 34-13-3-1 to -5 (2004)).

279. 855 N.E.2d 716 (Ind. Ct. App. 2006).

280. *Id.* at 721. (citing Brief for the Appellee at 17).

281. *Id.*

282. *Id.* (citing *Wheatcraft v. Wheatcraft*, 825 N.E.2d 23, 30 (Ind. Ct. App. 2005)).

283. *Id.* (citing IND. CODE § 35-43-6-12 (2004)).

284. *Id.*

285. 854 N.E.2d 1205 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

Bond (collectively, the "Bail Agents").²⁸⁶ Second, the court affirmed the trial court and held that GPS failed to prove malicious prosecution by the Bail Agents, and GPS's counterclaim to that effect should be denied.²⁸⁷

In reaching its conclusion regarding the intentional interference with business relationship claim, the court first listed the elements of the tort as: "(1) the existence of a valid relationship; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from defendant's wrongful interference with the relationship."²⁸⁸ The court noted that the Indiana Supreme Court additionally requires that the defendant must have acted illegally to achieve the complained of end result.²⁸⁹

The court of appeals also concluded that there was no evidence that the Bail Agents or their clients had any valid business relationship with the government entities with whom GPS had contracts, such as contracts, property or other rights, access to incarcerated defendants flowing from a valid business relationship, or consideration paid by the Bail Agents for such access.²⁹⁰ Furthermore, the court of appeals concluded that

[t]here is also no evidence that GPS intentionally interfered, or could interfere, with the relationship which Bail Agents claim to have had with the governmental entities . . . [because] [i]t was the governmental entities, not GPS, who adopted the cash bail program[, and] . . . who restricted the access of the Bail Agents to the jails and the incarcerated defendants.²⁹¹

Lastly, with regard to GPS's malicious prosecution counterclaim, the court held that because the original action granting the temporary restraining order against GPS was not terminated in GPS's favor, but rather, the permanent injunction was issued on the merits at a later time by a different trial court, GPS failed to prove malicious prosecution on the part of the Bail Agents.²⁹² The court therefore affirmed the trial court's order denying GPS's counterclaim.²⁹³

VII. INTENTIONAL TORTS

A. Defamation

During the survey period, Indiana appellate courts decided no less than three

286. *Id.* at 1210.

287. *Id.* at 1210-11.

288. *Id.* at 1209 (citing *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 598 n.21 (Ind. 2001)).

289. *Id.* (citing *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286, 291 (Ind. 2003)).

290. *Id.*

291. *Id.* at 1209-10.

292. *Id.* at 1211.

293. *Id.*

cases regarding suits for defamation. One of these cases, from the Indiana Supreme Court, made new law. In *Kelley v. Tanoos*,²⁹⁴ the Indiana Supreme Court decided a defamation case based upon the qualified privilege defense. The defendant in *Kelley*, Daniel Tanoos (“Tanoos”), made statements to plaintiff Paul Kelley’s (“Kelley”) employer accusing Kelley of firing a shotgun at Tanoos.²⁹⁵ When the statements were made, the police were conducting an investigation, and they knew of and cooperated with Tanoos’s decision to make the accusatory statements.²⁹⁶ The police gave Tanoos questions to ask and wired him so the conversation would be recorded.²⁹⁷ Nevertheless, Kelley was never charged with a crime related to the shooting.²⁹⁸

Kelley subsequently sued Tanoos for defamation for the statements made during the taped conversation.²⁹⁹ The trial court granted Tanoos’s motion for summary judgment “without findings of fact or conclusions of law.”³⁰⁰ “The [c]ourt of [a]ppeals reversed and remanded, holding that” there were genuine issues of material fact regarding the defamation claim and that Tanoos’s statements were not qualifiedly privileged.³⁰¹ The Indiana Supreme Court affirmed the trial court, and held that “Tanoos is protected from liability for defamation in these circumstances because the statements were made to assist law enforcement investigate criminal activity.”³⁰²

The Indiana Supreme Court relied on the qualified privilege doctrine to decide the case. “A qualified privilege protects ‘communications made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty, either public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty.’”³⁰³ Furthermore, communications to law enforcement officers are protected by the qualified privilege “[t]o ‘enhance[] public safety by facilitating the investigation of suspected criminal activity.’”³⁰⁴ Whether the privilege applies is a question of law for the court.³⁰⁵

294. 865 N.E.2d 593 (Ind. 2007).

295. *Id.* at 595.

296. *Id.* at 596.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 595.

303. *Id.* at 597 (quoting *Bals v. Verduzco*, 600 N.E.2d 1353, 1356 (Ind. 1992)).

304. *Id.* (second alteration in original) (quoting *Holcomb v. Walter’s Dimmick Petroleum, Inc.*, 858 N.E.2d 103, 108 (Ind. 2006)). In *Holcomb*, also decided by the Indiana Supreme Court during the current survey period, the court held that the defendant’s statements to a police officer, relaying that she believed the plaintiff had driven from the gas station without paying for pumped gasoline, could not be the basis for claims of false arrest, false imprisonment, defamation, or abuse of process, because such statements were qualifiedly privileged. *Holcomb*, 858 N.E.2d at 105.

305. *Kelley*, 865 N.E.2d at 597 (citing *Bals*, 600 N.E.2d at 1356).

Even though the Indiana Supreme Court found the common interest privilege to be inapplicable,³⁰⁶ it found the public interest privilege to be applicable.³⁰⁷ Both of these privileges are qualified privileges. This decision created new law in Indiana. As the court noted, Indiana had not yet adopted the Restatement (Second) of Torts section 598 comment f reading of the public interest privilege.³⁰⁸ Comment f provides that the public interest privilege “affords protection to a private citizen who publishes defamatory matter to a third person even though he is not a law enforcement officer, under circumstances which, if true, would give to the recipient a privilege to act for purposes of preventing a crime or of apprehending a criminal or fugitive from justice.”³⁰⁹ The court cautioned, however, that extending the public interest privilege to protect communications of private citizens is not without its limits.³¹⁰

The public interest privilege applies only to communications made to private citizens if the statements further the same interest as communications made to law enforcement officers.³¹¹ “That interest is grounded in a public policy intended to encourage private citizens and victims not only to report crime, but also to assist law enforcement with investigating and apprehending individuals who engage in criminal activity.”³¹²

In *Hamilton v. Prewett*,³¹³ the Indiana Court of Appeals affirmed a trial court’s grant of summary judgment on a defamation claim involving a website.³¹⁴ “The law of defamation was created to protect individuals from reputational attacks.”³¹⁵ To win a defamation claim, four elements must be proven: “(1) a communication with defamatory imputation, (2) malice, (3) publication, and (4) damages.”³¹⁶ To determine whether defamatory imputation exists, courts will look “‘among other factors, . . . the temper of the times [and] the current of contemporary public opinion.’”³¹⁷

The court determined that no Indiana court has addressed the relationship among defamation and parody, which was at issue in *Hamilton*, and looked to case law from other jurisdictions and secondary sources for guidance.³¹⁸ The

306. *Id.* at 598-99.

307. *Id.* at 601.

308. *Id.* at 600.

309. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 598 cmt. f (1977)).

310. *Id.*

311. *Id.*

312. *Id.* at 601.

313. 860 N.E.2d 1234 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 459 (Ind. 2007).

314. *Id.* at 1247.

315. *Id.* at 1243 (citing *Journal-Gazette Co. v. Bandido’s, Inc.*, 712 N.E.2d 446, 451 (Ind. 1999)).

316. *Id.* (citing *Lovings v. Thomas*, 805 N.E.2d 442, 447 (Ind. Ct. App. 2004)). Communications can be per se defamatory, in which case damages are presumed without proof, but that form of defamation is not applicable in *Hamilton*. *Id.*

317. *Id.* (quoting *Bandido’s*, 712 N.E.2d at 452 n.6).

318. *Id.* at 1243-44.

court concluded “that defamation and parody are mutually exclusive.”³¹⁹ The court reasoned that “‘parody’ is speech that one cannot reasonably believe to be fact because of its exaggerated nature,” whereas defamation requires a “false statement of fact.”³²⁰ The court warned, however, that an action may still lie for defamatory imputation of fact that is “couched in humor” because the key to the analysis is whether the information is factual.³²¹

The *Hamilton* court disagreed with the plaintiff’s arguments and concluded that the website at issue was a parody despite the factual differences between this case and *Hustler v. Falwell*,³²² a U.S. Supreme Court case wherein defendant Falwell’s claim of intentional infliction of emotional distress was dismissed on summary judgment because the cartoon about which he complained was deemed to be a parody rather than defamatory imputation of fact.³²³

B. Battery

In *Mullins v. Parkview Hospital, Inc.*,³²⁴ the Indiana Supreme Court affirmed the trial court’s grant of summary judgment to defendant LaRea VanHoey (“VanHoey”), a then student of a University of St. Francis emergency medical technician certification program.³²⁵ The plaintiffs, W. Ruth Mullins and Johnce Mullins, Jr. (collectively “Mullins”), sued VanHoey for battery for injuries Ruth Mullins suffered as a result of VanHoey’s attempt to intubate Mullins.³²⁶ In affirming the trial court, the Indiana Supreme Court concluded that there was no evidence that VanHoey intended to harm Mullins, a prerequisite to a successful battery claim.³²⁷

The court first examined the limited consent that Mullins gave to her doctors. Mullins consented to the surgery, but crossed out those portions of the consent form allowing “‘the presence of healthcare learners’” and photography and videotaping of the procedure.³²⁸ Nevertheless, the gynecologist and anesthesiologist attending Mullins’s surgery allowed VanRoey, a student, to

319. *Id.* at 1244 (citing *Browning v. Clinton*, 292 F.3d 235, 248 (D.C. Cir. 2002); *Victoria Square, LLC v. Glastonbury Citizen*, 891 A.2d 142, 145 (Conn. Super. Ct. 2006); *Kiesau v. Bantz*, 686 N.W.2d 164, 176-77 (Iowa 2004); *Stein v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 380 (Utah Ct. App. 1997). The *Hamilton* court also relied heavily on the U.S. Supreme Court’s opinion in *Hustler v. Falwell*, 485 U.S. 46, 57 (1988), which discussed parody with regard to actual malice in an intentional infliction of emotional distress claim. *Id.*

320. *Id.*

321. *Id.* at 1245 (citing *Hamilton*, 860 N.E.2d at 1251 (Najam, J., concurring)).

322. 485 U.S. 46 (1988).

323. *Hamilton*, 860 N.E.2d at 1245-47.

324. 865 N.E.2d 608 (Ind. 2007).

325. *Id.* at 609.

326. *Id.*

327. *Id.*

328. *Id.*

attempt to intubate Mullins, which resulted in injury.³²⁹

The court found that "[e]very actor in a medical context, however, is not obligated to obtain consent," and "the burden falls on a physician to obtain a patient's consent for treatment."³³⁰ In this case, the physician and anesthesiologist did obtain consent from Mullins for her surgery; however, neither passed along to VanHoey that Mullins did not consent to the presence of students.³³¹ Based upon VanHoey's status as a student, the court held that "she was under no obligation to obtain consent herself or inquire into the consent under which [the anesthesiologist] was acting."³³²

Because VanHoey was not obligated to obtain or know of Mullins's consent, the Mullinses had to "establish the traditional elements of battery," which includes intent to cause harm.³³³ The court found that the Mullinses did not allege that VanHoey intended her acts to cause harm to Mullins, and there were no facts or evidence supporting a proposition that VanHoey intended to harm Mullins.³³⁴ Therefore, the court affirmed the trial court's grant of summary judgment in favor of VanHoey, "a student following a curriculum and the instructions of her superiors" who had no intent to cause harm.³³⁵

329. *Id.*

330. *Id.* at 610 (citing *Culbertson v. Mernitz*, 602 N.E.2d 98, 101 (Ind. 1992)).

331. *Id.* at 611.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 612.

